SUPREME COURT
OF THE UNITED STATES

No. 10-1543
Title: Eric H. Holder, Jr., Attorney General, Petitioner
v.
Damien Antonio Sawyers
Docketed: June 23, 2011
Linked with 10A1013
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-70181)
Decision Date: October 14, 2010
Rehearing Denied: February 1, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 14 2011	Application (10A1013) to extend the time to file a petition for a writ of certiorari from May 2, 2011 to June 1, 2011, submitted to Justice Kennedy.
Apr 20 2011	Application (10A1013) granted by Justice Kennedy extending the time to file until June 1, 2011.
May 20 2011	Application (10A1013) to extend further the time to file a petition for a writ of certiorari from June 1, 2011 to June 23, 2011, submitted to Justice Kennedy.
May 25 2011	Application (10A1013) granted by Justice Kennedy extending the time to file until June 23, 2011.
Jun 23 2011	Petition for a writ of certiorari filed. (Response due July 25, 2011)
Jul 21 2011	Order extending time to file response to petition to and including August 24, 2011.
Aug 24 2011	Brief of respondent Damien Antonio Sawyers in opposition filed.
Sep 7 2011	DISTRIBUTED for Conference of September 26, 2011.
Sep 8 2011	Reply of petitioner Eric H. Holder, Jr., Attorney General filed. VIDED. (Distributed)
Sep 27 2011	Petition GRANTED the petition for writ of certiorari in No. 10-1542 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Nov 14 2011	SET FOR ARGUMENT ON Wednesday, January 18, 2012.
Nov 14 2011	Brief of petitioner Eric H. Holder, Jr., Attorney General filed. VIDED.
Nov 14 2011	Joint appendix filed.
Nov 18 2011	CIRCULATED.
Nov 18 2011	Record received from U.S.C.A. for Ninth Circuit. (1 envelope)
Dec 14 2011	Brief of respondent Damien Antonio Sawyers filed. (Distributed)
Dec 20 2011	Motion for divided argument filed by respondents. VIDED.
Dec 21 2011	Brief amicus curiae of National Immigration Justice Center filed. VIDED. (Distributed)

Jan 6 2012	Motion for divided argument filed by respondents GRANTED. VIDED.
Jan 11 2012	Reply of petitioner Eric H. Holder, Jr., Attorney General filed. VIDED. (Distributed)
Jan 18 2012	Argued. For petitioner: Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent in No. 10-1542: Stephen B. Kinnaird, Washington, D. C. For respondent in No. 10-1543: Charles A. Rothfeld, Washington, D. C.

No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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In the Supreme Court of the United States

No. 10-1543

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Attorney General Eric H. Holder, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App. 5a-8a) and the immigration judge (App. 9a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2010. A petition for rehearing was denied on February 1, 2011 (App. 3a). On April 20, 2011, Justice Kennedy extended the time within which to file a peti-

tion for a writ of certiorari to and including June 1, 2011. On May 25, 2011, Justice Kennedy further extended the time to and including June 23, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App. 16a-18a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident alien as follows:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a).

The INA defines the phrase "lawfully admitted for permanent residence," as used in Subsection (a)(1), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The INA defines "residence," as used in Subsection (a)(2) ("resided"), as the alien's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). And the INA defines "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). An alien may be "admitted" to the United States either at a port of entry or by adjusting to a lawful status while already in the country. See, *e.g.*, *In re Alyazji*, 25 I. & N. Dec. 397, 399-400 (B.I.A. 2011).

The cancellation-of-removal statute further provides that an alien's period of continuous residence is deemed to end

> when the alien is served a notice to appear under section 1229(a) of this title, or * * * when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1)(A)-(B).

To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998).

The alien bears the burden of proof on those issues. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d). The ultimate discretion of the Attorney General to grant such relief is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted).

2. a. In October 1995, at the age of fifteen, respondent, a native and citizen of Jamaica, was admitted to the United States as a lawful permanent resident (LPR). App. 10a. According to respondent, his mother already had been living in the United States as an LPR at the time. App. 6a. The record does not indicate whether respondent had been present in the United States prior to his admission as an LPR in 1995.

b. On August 9, 2002, respondent was convicted of maintaining a dwelling for keeping a controlled substance, in violation of Delaware law. App. 11a. On December 14, 2005, he was convicted of criminal possession of a controlled substance, cocaine, in violation of New York law. App. 10a. DHS subsequently commenced removal proceedings against respondent by filing a Notice to Appear alleging (as amended) that he is subject to removal from the United States under 8 U.S.C. 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. App. 10a-11a. Before the immigration judge (IJ), respondent denied the charge of removability and, in the alternative, sought relief in the form of cancellation of removal pursuant to 8 U.S.C. 1229b(a). App. 11a-13a.

In September 2007, after a merits hearing, the IJ found respondent removable as charged and further held that he was ineligible for cancellation of removal. App. 11a-14a. As to the latter question, the IJ deter-

mined that respondent's 2002 conviction would have made him removable at that time and therefore cut off his period of residence in the United States before he had accrued the seven continuous years of residency required by 8 U.S.C. 1229b(a)(2). App. 13a.[1]

c. The Board of Immigration Appeals (Board) agreed that respondent was ineligible for cancellation of removal and dismissed his appeal. App. 5a-8a. As an initial matter, the Board agreed with the IJ that respondent's 2002 Delaware conviction qualified as a conviction for a removable offense (thereby cutting off his period of continuous residency short of the requisite seven years). App. 6a.

The Board then noted that the IJ did not address respondent's argument that his mother's period of lawful residence should be attributed to him for purposes of meeting Section 1229b(a)(2)'s seven-year continuous-residence requirement. The Board, however, ultimately deemed that omission harmless. App. 6a-7a. The Board acknowledged the holding in *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1021-1029 (9th Cir. 2005), that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the purpose of satisfying the seven-year residency requirement in Section

[1] At the time of the hearing, respondent had been "an alien lawfully admitted for permanent residence" for more than five years and hence satisfied 8 U.S.C. 1229b(a)(1). See 8 C.F.R. 1.1(p); *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006). In addition, although DHS originally charged respondent with being subject to removal for having been convicted of a drug-trafficking aggravated felony, it later withdrew that charge and the agency made no determination as to whether any of respondent's convictions were aggravated felony offenses. App. 11a. Accordingly, the government does not dispute that respondent also satisfied 8 U.S.C. 1229b(a)(3) for present purposes.

1229b(a)(2). App. 6a-7a. But the Board considered itself bound by its more recent precedential decision, *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007), in which the Board had explained its disagreement with *Cuevas-Gaspar* in declining to extend the imputation rule to Section 1229b(a)(1)'s five-year LPR status requirement. App. 7a. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decision in *Escobar* pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). App. 7a.

d. Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board issued a published decision squarely rejecting the use of imputation for meeting Section 1229b(a)(2)'s seven-year continuous-residence requirement.

3. The Ninth Circuit granted respondent's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). App. 1a-2a. In *Mercado-Zazueta*, rejecting the Board's decisions in *Ramirez-Vargas* and *Escobar*, the Ninth Circuit treated *Cuevas-Gaspar*'s holding as binding with respect to Section 1229b(a)(2), 580 F.3d at 1115, and extended it to Section 1229b(a)(1), *id.* at 1113. In the present case, the Ninth Circuit remanded "on an open record for any further determinations that the [Board] deems necessary," including findings "regarding the residency of [respondent's] mother and regarding whether [respondent] was a minor residing with her." App. 2a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit is the only court of appeals that permits imputation to an alien of his parent's lawful admission date and years of residence after that admission for purposes of enabling the alien to satisfy the statutory eligibility criteria for cancellation of removal. Invoking *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), which in turn relied on *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), the Ninth Circuit granted the petition for review in this case challenging the Board's determination that respondent was ineligible for cancellation of removal. The Ninth Circuit did so notwithstanding the fact that respondent had not "resided in the United States continuously for 7 years after having been admitted in any status" (8 U.S.C. 1229b(a)(2)). For the reasons set forth in the government's petition for a writ of certiorari (at 8-24) in *Martinez Gutierrez* v. *Holder*, No. 08-70436 (9th Cir. Jan. 24, 2011), filed concurrently with this petition, this Court's review is warranted.[2]

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[2] The respondent in *Martinez Gutierrez* does not satisfy either the seven-year continuous residency requirement of Section 1229b(a)(2) or the five-year LPR status requirement of Section 1229b(a)(1). The certiorari petition in *Martinez Gutierrez* therefore presents both issues. The Board's decision in that case, however, ultimately appeared to deny eligibility for cancellation of removal based on the latter requirement only. See Pet. 22 n.4, *Martinez Gutierrez*, *supra*. This case squarely presents the former requirement. Accordingly, to ensure that both requirements are properly before this Court, the government requests that certiorari be granted in both cases and that the cases be consolidated for argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
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TONY WEST
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JUNE 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-70181
Agency No. A044-852-478

DAMIEN ANTONIO SAWYERS, ETC. PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT

[Filed: Oct. 14, 2010]

MEMORANDUM*

Submitted Oct. 8, 2010**

On Petition for Review of an Order of the Board of Immigration Appeals

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Before: BEEZER and GRABER, Circuit Judges, and CARNEY,*** District Judge.

Petitioner Damien Antonio Sawyers petitions for review of the Board of Immigration Appeal's dismissal of his appeal from the immigration judge's denial of his request for cancellation of removal under 8 U.S.C. § 1229b(a)(1). We grant the petition.

Petitioner argues that, pursuant to *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005), we must impute to him his mother's residency for purposes of cancellation of removal. In its response brief, the government argued that our decision in *Cuevas-Gaspar* no longer controls. As the government concedes in its Federal Rule of Appellate Procedure 28(j) letter to this court, however, we thereafter rejected those same arguments in *Mercado-Zazueta v. Holder*, 580 F.3d 1102 (9th Cir. 2009).

Accordingly, we grant the petition and remand on an open record for any further determinations that the BIA deems necessary, including a determination of when imputation should start. *See INS v. Orlando Ventura*, 537 U.S. 12 (2002) (per curiam); *Soto-Olarte v. Holder*, 555 F.3d 1089 (9th Cir. 2009). The agency must make findings in the first instance regarding the residency of Petitioner's mother and regarding whether Petitioner was a minor residing with her.

Petition GRANTED. Case REMANDED.

*** The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-70181
Agency No. A 044-852-478

DAMIEN ANTONIO SAWYERS,
A.K.A. DAMIEN SAWYERS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT

[Filed: Feb. 1, 2011]

ORDER

Before: BEEZER and GRABER, Circuit Judges, and CARNEY,* District Judge.

Judge Graber has voted to deny Respondent's petition for rehearing en banc, and Judges Beezer and Carney have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

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* The Honorable Cormac J. Carney, United States District Judge for the Central District of California, sitting by designation.

APPENDIX C

[Seal omitted]

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SAWYERS, DAMIEN ANTONIO **A44-852-478**

Date of this notice:

12/26/2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
DONNA CARR
Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A44 852 478 - Eloy, AZ

Date: [Dec. 26, 2007]

In re: DAMIEN ANTONIO SAWYERS a.k.a. Damien Sawyers

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hugo F. Larios, Esquire

ON BEHALF OF DHS: D'Anna Harrison
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (withdrawn)

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(I)] - Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The respondent is a native and citizen of Jamaica. In a decision dated September 20, 2007, an Immigration Judge found him statutorily ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a)(1), and ordered him removed to Jamaica. This timely appeal followed. The appeal will be dismissed.

The Immigration Judge noted that the respondent failed to show that his Delaware conviction for maintaining a dwelling for keeping controlled substances was a conviction involving less than 30 grams of marijuana for personal use. I.J. at 5. We agree, and note that the conviction in question necessarily involved either cocaine (as established by the reference in count 6, the count under which the respondent was convicted, to the allegations of count 1-4) or the possession of marijuana with the intent to deliver (as established by the reference in count 6 to the allegations of count 5). *See* Exh. 9.

In his decision, the Immigration Judge did not address the respondent's argument (set forth in a pre-trial brief) that his mother's period of residence (as a lawful permanent resident) should be attributed to him for purposes of counting the 7-year continuous residence requirement for cancellation of removal under section 240A(a)(2) of the Act. *See Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005); *cf. Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007) (rejecting *Cuevas-Gaspar* analysis and noting that *Cuevas-Gaspar* dealt with *section 240A(a)(2)* of the Act and holding that under *section 240A(a)(1)* of the Act a parent's lawful permanent resident status cannot be imputed to a child). While the Immigration Judge made no factual findings with re-

spect to this issue, and did not mention the respondent's argument in his decision, we find this omission harmless.

The Ninth Circuit in *Cuevas-Gaspar* interpreted a provision of the Act that it found to be "silent or ambiguous" on the issue of imputing lawful permanent residence. 430 F.3d at 1021-1022. Subsequent to *Cuevas-Gaspar* this Board, in a published decision, rejected the Ninth Circuit's interpretation and held that the lawful permanent residence of a parent could not be imputed to a child in these circumstances. *Matter of Escobar, supra*, at 233-234. In the course of so doing, we provided a fuller explanation of our reasons for not imputing the lawful admission of a parent to a child who was later admitted as a lawful permanent resident. *Id.* This fuller rationale was not before the Ninth Circuit when it ruled in *Cuevas-Gaspar*. Recently, the Ninth Circuit held in similar circumstances that it must give "*Chevron* deference" to an agency's statutory interpretation that conflicts with its own earlier interpretation. *Gonzales v. Department of Homeland Security*, __ F.3d __, 2007 WL 4209273 (9th Cir., Nov. 30, 2007). In the prior Ninth Circuit decision at issue in *Gonzales*, the court - using language virtually identical to that employed in Cuevas-*Gaspar* - had found this Board's interpretation of an ambiguous provision to be "unreasonable". *See Perez-Gonzales v. Ashcroft*, 379 F.3d 783, 788-789 (9th Cir. 2004), *reversed by Gonzales v. Department of Homeland Security, supra*. The court nevertheless found that if it was required to defer to the subsequent interpretation by this Board. We thus consider ourselves bound by our more recent precedent in *Matter of Escobar*. *See generally National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2007); *Chevron*

USA, Inc. v. National Resources Defense Council, 467 U.S. 837 (1984).

ORDER: The respondent's appeal is dismissed.

/s/ [EDWARD R. GRANT]
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Eloy, Arizona 85231

File No.: A 44 852 478 September 20, 2007

In the Matter of

DAMIEN ANTONIO SAWYERS Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii) of the Act - conviction of an aggravated felony for trafficking in a controlled substance.

Section 237(a)(2)(B)(i) of the Act - conviction of a controlled substance offense other than a single offense involving personal possession of 30 grams or less of marijuana.

APPLICATIONS: Motion to terminate and cancellation of removal for certain lawful permanent resident aliens.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Mr. Hugo Larios Law Offices of Hugo Larios Tempe, AZ	Robert C. Bartlamay Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent in these proceedings is a 27-year-old male, native and citizen of Jamaica. The United States Department of Homeland Security brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filing of a Notice to Appear with the Immigration Court. *See* Exhibit 1 herein.

REMOVABILITY

The Notice to Appear alleged that the respondent (1) was not a citizen or national of the United States of America; (2) that he was a native of Jamaica and a citizen of Jamaica; (3) that he was admitted to the United States at New York, New York on or about the 18th of October, 1995 as a lawful permanent resident; (4) that he was convicted of the crime of criminal possession of a controlled substance in the fourth degree, specifically cocaine, in violation of Section 220.09 of the New York State Penal Law on or about the 14th of December, 2005. Based upon those facts and allegations, the Department of Homeland Security charged that the respondent was removable under the provisions of Section 237(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act for that offense relating to illicit trafficking in a con-

trolled substance as described in the Controlled Substances Act, as well as the charge of removability under Section 237(a)(2)(B)(i) of the Act, at any time after admission conviction of violating any law or regulation of a State or the United States relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

At a prior session of the Court, the respondent, through counsel, denied the factual allegation, attempting to show derivative citizenship. He admitted factual allegation 2, admitted factual allegation 3, denied factual allegation 4. At that time, the Department of Homeland Security withdrew the aggravated felony charge under Section 237(a)(2)(A)(iii), leaving as the only viable charge 237(a)(2)(B)(i), conviction of a controlled substance violation other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

Exhibit 1-A in this record of proceedings is an I-261. It was filed by the Department of Homeland Security on the 30th of August, 2007, at what would have been a merit hearing on respondent's application for cancellation. It alleged that the respondent was, on the 9th of August, 2002, convicted of the crime of maintaining a dwelling for keeping a controlled substance, specifically cocaine and marijuana, in violation of Title 16, Section 4755(a)(5) of the Delaware Code of 1974, as amended.

The respondent, on today's date, admitted factual allegation 5. The respondent designated Jamaica as the country of removal should removal become necessary, expressing no fear of torture or persecution if his removal to Jamaica became necessary.

In addition to the previously mentioned documentary exhibits, Exhibit 2 in these proceedings is a Motion to Terminate these proceedings based on citizenship. That motion was denied by the Court, and the Court did find factual allegation 1. Exhibit 3 herein, is the Department's response to the Motion to Terminate. Exhibit 4 are the Department submitted documents which include an I-213, as well as a conviction document for the additionally alleged conviction under New York Law, as well as a copy of the New York criminal statute. Exhibit 5 for identification is a copy of an interim BIA decision *In re Pagan*. It related to the respondent's citizenship claim. Exhibit 6 is the respondent's EOIR 42-A, his application for cancellation. Exhibit 7 are further Government documents, including a visa and a copy of the respondent's criminal history. Exhibit 8 herein are additional supporting documents for the respondent's application for cancellation of removal. Exhibit 9 is a copy of the Delaware conviction. Exhibit 9-A is a copy of the statute that the respondent was convicted under. The conviction documents also include the criminal indictment by a grand jury. Exhibit 9 are those conviction documents; 9-A is the statutory extract. As I said, the Department lodged that charge at what would have been a merit hearing on the respondent's application for cancellation of removal, which has previously been mentioned as Exhibit 6.

The matter was set over. The respondent pled today. The parties briefed. The Department's brief is found as Exhibit 10. The respondent's brief at Exhibit 11. What is in question is whether or not the respondent's conviction, as contained on the Notice to Appear, stops the seven years as is required under Section 240A(a) of the Act.

The Court has concluded, after examining all the facts and relevant evidence in this case, that conviction under Delaware Law does in fact constitute a conviction that would subject the respondent to removability under Section 237(a)(2)(B)(i) of the Act. The Court commends respondent's counsel, Mr. Larios, for a novel argument.

Mr. Larios argues that the statute is divisible and that the respondent, in all likelihood, could have been convicted for possession of less than 30 grams of marijuana. It is an argument that would succeed but for the fact that the respondent's conviction involved marijuana and cocaine. The 30-gram marijuana exception, oft referred to under Immigration Law as the Lennon (phonetic sp.) exception, applies only to marijuana. It does not apply to any other drugs, and the respondent was convicted of keeping a dwelling for cocaine as well; the conviction documents indicating conjunctive language, cocaine and marijuana.

Nonetheless, despite the fact that he raises a good argument and has provided the Court a good, sound brief, the Court finds that conviction which the respondent admitted to in Exhibit 1-A would have subjected the respondent to removability at that time under 237(a)(2)(B)(i) of the Act, and therefore will cut off his seven years. Since that is the case, the respondent is not statutorily eligible for the requested relief, and the Court will at this time pretermit his application for cancellation of removal under Section 240A(a) of the Act.

The respondent is not eligible for any other forms of relief, nor has he expressed a fear of return to Jamaica, therefore the following Order shall be entered.

ORDER

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal be and hereby is denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Jamaica on the charge sustained against him.

/s/ JOHN W. DAVIS
JOHN W. DAVIS
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JOHN W. DAVIS, in the matter of:

DAMIEN ANTONIO SAWYERS

A 44 852 478

Eloy, Arizona

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ ALICE M. SMITH
ALICE M. SMITH, TRANSCRIBER

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November 6, 2007
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

APPENDIX E

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the

alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

* * * * *

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Petitioner,

v.

DAMIEN ANTONIO SAWYERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a parent's years of residence after lawful admission to the United States may be imputed to an unemancipated minor child who resided with that parent during the period for which he seeks imputation, for purposes of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that aliens seeking discretionary cancelation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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RESPONDENT'S BRIEF IN OPPOSITION

Under the Immigration and Nationality Act (INA), certain aliens deemed removable from the United States may apply for discretionary cancellation of removal. As relevant here, a legal permanent resident is eligible for cancellation if, among other things, he or she has "resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). The Ninth Circuit has concluded that, for determining satisfaction of this requirement, an alien may impute the legal status of a parent with whom the alien resided while an unemancipated minor. The government seeks certiorari, contending (1) that the Ninth Circuit has misinterpreted the INA, (2) that two circuits have reached a contrary result, and (3) that this issue is of extraordinary importance because the Ninth Circuit's approach "impedes the government's high-priority efforts to remove criminal aliens."

All three of these assertions are wrong. The government has not demonstrated that the question presented is important—there is no indication that it arises with much frequency and, in any event, however the issue is resolved the Attorney General will retain unreviewable discretion to deny cancellation of removal to *any* alien. The conflict in the circuits asserted by the government is overstated—there is uncertainty about the rule that applies in some circuits, and many considerations that bear on the issue presented here have not been widely addressed by the courts of appeals. And the decision below is correct—under the government's approach, aliens who are minors (including those who were eligible for automatic adjustment of status) may be categorically barred from seeking cancellation of removal simply

because a parent failed to complete an application for such an adjustment. The INA surely does not compel that perverse result.

STATEMENT

1. A lawful permanent resident adjudicated removable from the United States may petition the Attorney General for discretionary relief from removal. 8 U.S.C. § 1229b. An alien is *eligible* to apply for cancellation of removal if he or she: (1) "has been an alien lawfully admitted for permanent residence for not less than 5 years," (2) "has resided in the United States continuously for 7 years after having been admitted in any status," and (3) "has not been convicted of any aggravated felony." *Id.* § 1229b(a).

This case concerns the second requirement: that, to be eligible for cancellation of removal, an alien must have resided continuously in the United States for at least seven years in any lawful status. The time period of an alien's lawful presence ends either when the alien is served notice to appear for a removal proceeding or when the alien commits an offense that renders him or her inadmissible or removable. 8 U.S.C. § 1229b(d)(1).

Under the INA, certain children of lawful permanent residents and U.S. citizens may adjust their status to that of lawful permanent resident. See 8 U.S.C. §§ 1153(a)(2) & 1255. To do so, an immigrant must file an application with U.S. Citizenship and Immigration Services, using a Form I-485. See Form I-485, Application to Register Permanent Residence or Adjust Status, OMB No. 1615-0023.

2. In October 1995, at the age of fifteen, respondent was admitted to the United States as a lawful permanent resident. Pet. App. 10a.[1] Respondent's mother, however, became a lawful permanent resident in 1989, when respondent was nine years old. J.A. 8.[2] The date of respondent's physical arrival in the United States and the place of his residence as an unemancipated minor are not reflected in the record.

Six years and ten months after respondent was admitted as a lawful permanent resident, on August 9, 2002, he was convicted in Delaware state court of "maintaining a dwelling for keeping a controlled substance." Pet. App. 11a. The government subsequently commenced removal proceedings against him. Respondent conceded that his conviction rendered him subject to removal but sought cancellation of removal. *Ibid.* In particular, he contended that he satisfied the second prong of the Section 1229b(a) test for eligibility for cancellation because the period of his mother's lawful permanent residence in the United States could be imputed to him. The government, in turn, conceded that respondent satisfies the first prong of the cancellation-eligibility test (he had been admitted as a lawful permanent resident for longer than five years at the time of the offense) and third prong of the test (he has not been convicted of an

---

[1] An alien may adjust his or her status to "lawful permanent resident" following physical admission to the United States. See, *e.g.*, *Martinez* v. *Mukasey*, 519 F.3d 532, 542 (5th Cir. 2008). It is unclear from the record how long respondent had been in the United States at the time he was admitted as a lawful permanent resident.

[2] "J.A." refers to the Joint Appendix in the Ninth Circuit.

"aggravated felony"). Pet. 5 n.1. But the government contends that respondent cannot satisfy the second prong because he is two months shy of having resided in the United States for seven years under an independent lawful status and his mother's period of lawful residence while he was an unemancipated minor may not be imputed to him. Therefore, the government concluded, he is not eligible for cancellation of removal. Pet. 7.

3. The Immigration Judge ("IJ") found that respondent's conviction rendered him removable and that he is ineligible for cancellation of removal because he failed the second prong of the Section 1229b(a) test. Pet. App. 13a. The IJ did not, however, expressly discuss whether respondent could impute the lawful status of his mother while he was an unemancipated minor. *Ibid.*

4. The Board of Immigration Appeals ("BIA") affirmed, specifically declining respondent's request for imputation. Pet. App. 7a. In so doing, the BIA rejected the Ninth Circuit's decision in *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), which had authorized imputation in similar circumstances. Pet. App. 7a. The BIA explained that it had disagreed with *Cuevas-Gaspar* in a subsequent published decision, *In re Escobar*, 24 I. & N. Dec. 231 (BIA 2007), and it followed that opinion in lieu of *Cuevas-Gaspar*. Pet. App. 7a.

5. The Ninth Circuit reversed. The court applied the rule of *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), in which it had rejected the BIA's decision in *In re Escobar*. Pet. App. 2a. Instead, the court concluded that the BIA "must impute to [respondent] his mother's residency for purposes of can-

cellation of removal." *Ibid.* The court remanded so that the agency could "make findings in the first instance regarding the residency of [respondent's] mother and regarding whether [respondent] was a minor residing with her." *Ibid.* It did so "on an open record for any further determinations that the BIA deems necessary, including a determination of when imputation should start." *Ibid.*

The court of appeals subsequently denied the government's petition for rehearing en banc. No judge on the panel called for or recommended rehearing, and no judge on the full court of appeals requested a vote on the government's petition. Pet. App. 3a.

REASONS FOR DENYING THE PETITION

The government's arguments in favor of review by this Court are substantially overstated. The question presented is of limited importance, if for no other reason than that the holding below will not allow *any* alien otherwise subject to removal to remain in the United States without the Attorney General's discretionary approval. What is more, the question presented has been definitively resolved by only two courts of appeals. And the government's presentation on the merits, which makes up the bulk of its argument, is dubious. In these circumstances, the government simply has not presented a sufficient basis for the Court to grant certiorari at this time.

A. The Issue Presented Here Is Of Limited Importance.

To begin with, even if the decision below were incorrect, and even if there were disagreement in the courts of appeals on the question presented—in fact, the government's argument on these points is wrong,

as we will demonstrate—the government has failed to show that the question presented is a recurring one of substantial importance. In arguing to the contrary, the government maintains that "[t]he Ninth Circuit's imputation rule creates significant adverse consequences that underscore the need for this Court's review." Petition for a Writ of Certiorari at21-22, *Holder* v. *Martinez Gutierrez*, No. 10-1542 ("Gutierrez Pet."). But that conclusion is insupportable. In fact, not a single judge supported or called for a vote on the government's petition for rehearing en banc, even though the judges of the Ninth Circuit are not shy about taking cases en banc or dissenting from the denial of en banc rehearing when the panel went astray on an important question. They failed to do so in this case for good reason.

First, it is not evident that the issue here arises with great frequency. Although the government has presented the Court with unpublished data on the percentage of the Nation's cancellation-of-removal petitions that are considered in the Ninth Circuit (*Gutierrez* Pet. 22), it offers "no statistics * * * on how many cancellation-of-removal applications would not have been granted but for reliance on imputation." *Ibid.* In this context, that the Ninth Circuit's rule theoretically "expand[s] the class of removable aliens eligible for such relief" (*ibid.*) hardly establishes a pressing need for review.

Second, the government is wrong to contend that review is warranted here because "the Ninth Circuit's rules impede the execution of the INA's goal * * * of removing criminal aliens." *Gutierrez* Pet. 22. The sole issue here is *eligibility* for cancellation relief, not cancellation itself. Thus, "any practical effect on policing our Nation's borders * * * is a limited

one"; while respondent is eligible to apply for cancellation under the Ninth Circuit's rule, "[a]ny relief he may obtain depends upon the discretion of the Attorney General." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010). See also *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480 (2010) (describing the "equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses"); *Mercado-Zazueta*, 580 F.3d at 1115 (the Ninth Circuit's imputation rule "merely grant[s] access to the possibility of cancellation of removal, leaving the ultimate determination to the sound discretion of the Attorney General"). The Attorney General thus retains authority to deny cancellation when an alien's criminal history suggests that he or she presents a danger to the Nation. And the exercise of this discretion is not subject to judicial review. See 8 U.S.C. § 1252(a)(2)(B)(i). The suggestion that the rule applied below has any substantial effect on "removing criminal aliens" is thus greatly exaggerated; its only real effect is to *permit* the Attorney General to exercise his discretion in favor of an alien who merits relief, and who otherwise would be removed from the country no matter how compelling his or her case to stay.

Third, the government's speculation as to the possible future extension of the imputation rule does not provide a basis for review. In fact, as the government acknowledges, attempts by aliens to extend imputation to other statutory contexts have been uniformly "unsuccessful[]"—and, as the government's citations show, such attempts have been repeatedly turned aside by the Ninth Circuit itself. *Gutierrez* Pet. 23. See, *e.g.*, *Ramos Barrios* v. *Holder*, 581 F.3d 849, 862 (9th Cir. 2009) ("The meaning of 'physical

presence' is quite distinct from the requirements we have previously held to be imputable. Indeed, the difference in meaning is so great as to be dispositive."); *Saucedo-Arevlao* v. *Holder*, 636 F.3d 532, 533 (9th Cir. 2011) (per curiam) ("But we recently clarified that line of authority and limited our imputation rule to encompass only an intent, state of mind, or legal status.").[3] The government's unsubstantiated snowball-effect argument accordingly provides no reason for review of this issue now.

B. It Would Be Premature To Address The Conflict In The Circuits Asserted By The Government.

The government also maintains that the Court should grant review to resolve a split in the courts of appeals on the question presented here, asserting that the Ninth Circuit is in conflict with the Third and Fifth Circuits. But here, too, the government's submission is substantially overstated. There is uncertainty about the rule applied in at least one of the supposedly conflicting courts of appeals. Moreover, key aspects of the question presented have been inadequately discussed by the lower courts. A grant of review to resolve the conflict presented by the government accordingly would be premature.

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[3] The government also argues that "the Ninth Circuit's interpretation imposes an additional burden on the government insofar as it increases litigation before immigration courts and requires DHS to devote resources to litigating facts that would otherwise not be relevant to an alien's cancellation-of-removal case." *Gutierrez* Pet. 23. But without a showing of how often this issue arises, this is a very thin reed upon which to seek review; and that is especially so as aliens are likely to contest their removal in court, whether or not the Ninth Circuit's imputation rule stands.

1. We recognize that the decision below conflicts with the Fifth Circuit's skeletal decision in *Deus* v. *Holder*, 591 F.3d 807 (5th Cir. 2009)—which devoted less than one page of analysis to the issue. But the rule in the Third Circuit is less clear. To be sure, that court disagreed with elements of the Ninth Circuit's analysis of the imputation rule. See *Augustin* v. *Att'y Gen.*, 520 F.3d 264, 270-271 (3d Cir. 2008). But the Third Circuit also noted a significant distinction between the circumstances in *Augustin* and those in the Ninth Circuit's cases. In *Augustin*, the alien sought to impute to himself the continuous presence of a parent for a period when the alien subject to removal was not physically present in this county. This difference was material to the court's analysis: Because the "petitioner did not 'actually dwell' in the United States for seven continuous years before he committed the crime involving moral turptitude that cut off his period of continuous residence," the BIA's "refusal to impute to petitioner his father's years of residence is permissible because it is a straightforward application of the statute's requirements." *Id.* at 269-270 (alterations omitted).

In each of the Ninth Circuit cases to address the issue, in contrast, the minor alien actually was physically present in the United States during the entire period of time for which he had imputed lawful residence, *and* the minor alien actually resided with the parent. See *Mercado-Zazueta*, 580 F.3d at 1103-1104; *Cuevas-Gaspar*, 430 F.3d at 1016; *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1022-1023 (9th Cir. 1994). Here, the Ninth Circuit strongly suggested that this issue is relevant to its analysis. The record does not reveal whether either of those things is true of petitioner, and the court accordingly remanded the case for fac-

tual findings as to "the residency of Petitioner's mother" and "whether Petitioner was a minor residing with her." Pet. App. 2a.

The Fourth Circuit, in dicta, has drawn precisely this distinction. It found that *Cuevas-Gaspar* "is factually distinguishable" from a case where the minor aliens "did not personally reside with their parents in the United States during the pertinent period." *Cervantes* v. *Holder*, 597 F.3d 229, 237 (4th Cir. 2010).[4] And the Fifth Circuit, too, noted that *Augustin* "may have rested * * * on the facts presented" because in that case Augustin did not actually dwell in the United States for the relevant period and because his "parent had preceded him into the United States. The Third Circuit found that the goal of maintaining relationships between legal permanent resident parents and their minor children could not alone form the basis to find the BIA's unwillingness to read into the statute an exception to the requirements for cancellation of removal for minors whose parents precede them in immigrating to the United States." *Deus*, 591 F.3d at 811 (citing *Augustin*, 520 F.3d at 270). There is accordingly no square conflict between the Third and Ninth Circuits on the question presented here; it is not at all certain that the Third Circuit would reject the Ninth Circuit's rule on the distinct facts presented here.

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[4] The government relies on the Fourth Circuit's decision in support of its assertion of a conflict. *Gutierrez* Pet. 20. Although that court did express disagreement with aspects of the Ninth Circuit's analysis (see *Cervantes*, 597 F.3d at 236-237), it also noted the distinction described in text. And the Fourth Circuit's discussion of the issue is, in any event, dicta, as the government acknowledges.

At most, therefore, the Fifth Circuit in *Deus* has departed from the Ninth Circuit. But rehearing en banc was not sought in *Deus* and, as we have explained, the Fifth Circuit's analysis was undeveloped. Such a thin conflict in the circuits—one that could resolve itself without this Court's intervention—is a skimpy basis for review.

2. Moreover, review is premature because there are substantial practical reasons for the Court to await additional consideration of the question presented by the lower courts. Not only have the courts of appeals inadequately considered whether physical presence in the United States or actual residence with the parent is required for imputation, but the courts have also yet to address fully a separate question—whether post-emancipation conduct of the alien is relevant.

In Section 1182(c) cases, the Ninth Circuit has suggested that imputation would be available only in circumstances where, upon reaching majority, the alien gained proper admission. See *Lepe-Guitron*, 16 F.3d at 1026 n.12 ("if an alien child has joined his or her parents in the United States prior to reaching majority, but has not secured permanent residency by that time, there will necessarily be a 'gap' in that person's lawful domicile, rendering it no longer 'unrelinquished'"). As imputation rests on the view that a minor takes the residence and status of his or her parent, imputation may cease when the alien reaches majority. It therefore is possible that courts could conclude that an alien who has failed to adjust his or her own status in a timely manner upon reaching majority may be precluded from invoking the imputation doctrine. This Court accordingly would benefit from further percolation of the issue to allow the

courts of appeals to first address the full range of considerations that bear on the issue presented here.[5]

C. The Decision Below Is Correct.

Finally, the government devotes the bulk of its attention to arguing that the Ninth Circuit's decision is wrong on the merits. Even if the government were correct on that score, review still would not be warranted for the reasons addressed above. But the government's argument on the merits is, in any event, wrong on its own terms. In fact, the Ninth Circuit was correct to conclude that an unemancipated minor who resides with a parent in the United States may impute the parent's residence for purposes of 8 U.S.C. § 1229b(a)(2).

1. To begin with, the government is wrong to argue that the plain language of Section 1229b(a)(2) bars imputation. *Gutierrez* Pet. 9-11. The statute, on its face, neither directly permits nor bars imputation. Tellingly, the courts that the government contends disagree with the Ninth Circuit have *not* adopted the textual arguments that the government offers here. To the contrary, the Third Circuit declared that "[t]he INA * * * does not expressly address the question whether parents' years of residence may be imputed to their minor children * * *. The cancellation of removal provision neither provides for such impu-

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[5] In the companion case to this one, *Martinez Gutierrez*, it appears there was an approximately one year "gap" between the respondent's reaching the age of majority and his obtaining admitted status. *Gutierrez* Pet. 4. In contrast, respondent here was admitted while still a minor. Pet. 4. The courts below, however, have had no opportunity to examine whether these factual differences are significant.

tation nor disallows it. * * * In short, in *Chevron* terms, 'the statute is silent [* * *] with respect to the specific issue.'" *Augustin*, 520 F.3d at 269 (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Both the Third and the Fifth Circuits therefore based their holdings on *Chevron* deference rather than the statutory language. See *id.* at 267-271; *Deus*, 591 F.3d at 811.

Those courts were correct to reject the government's strained argument from the statutory text. The government asserts that the statute's use of the phrase "*the* alien" precludes imputation. *Gutierrez* Pet. 8-9 (emphasis added). But this argument simply assumes its conclusion—that a parent's residence may not be imputed to an alien child. If imputation of residence *is* permissible for a minor child, "*the* alien" necessarily will be deemed to have satisfied the seven-year residency requirement.

For the same reason, the government's focus on the phrase "after having been admitted" fails. *Gutierrez* Pet. 8. If imputation is a permissible construction of the statute, then the admission of a parent may be imputed to a minor. Nothing in the statute itself forecloses such an interpretation.

Finally, the government invokes the INA's definition of "residence" to contend that Section 1229b(a)(2)'s use of the term "resided" "denotes the alien's own residence, and not the residence of anyone else." *Gutierrez* Pet. 10-11. But that is simply beside the point because aliens who may benefit from the imputation rule, like respondent here, *did* in fact "reside" in the United States, and did so for seven

years after *a parent* was admitted.[6] The requirement that an alien "reside" in the United States says nothing about whether an alien actually *residing* in this country may or may not impute the *lawful status* of a parent.

2. Although the language of the statute is not definitive, "[t]he construction of statutory language often turns on context" (*FCC* v. *AT & T Inc.*, 131 S. Ct. 1177, 1182 (2011))—and the context of the statute here demonstrates that the imputation rule is correct. See *Deal* v. *United States*, 508 U.S. 129, 132 (1993). The context of the statute includes the "contemporary legal context" at the time of enactment. *Cottage Sav. Ass'n* v. *Comm'r*, 499 U.S. 554, 562 (1991) (quotation omitted).

Section 1229b was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-594 ("IIRIRA"). Prior to IIRIRA, the Attorney General had the discretion under 8 U.S.C. § 1182(c) to cancel removal of an alien who possessed "a lawful unrelinquished domicile of seven consecutive years" in the United States. *INS* v. *St. Cyr*, 533 U.S. 289, 294-295 (quoting 8 U.S.C. § 1182(c)). IIRIRA repealed Section 1182(c) and replaced it with Section 1229b.[7]

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[6] As we have noted, the record does not establish when respondent arrived in the United States or how long he resided with his mother in this country. For present purposes, it therefore must be assumed that he resided with a parent for the requisite period; if the Ninth Circuit's decision is not disturbed, that factual question will be resolved on remand to the BIA.

[7] This change appears to have had two purposes. *First*, unlike Section 1182(c), Section 1229b bars relief for any alien who has

Under the now-repealed Section 1182(c), the courts of appeals that had addressed the question uniformly agreed that an unemancipated minor was permitted to impute the domicile status of a parent for the purpose of satisfying the waiver requirements. See *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) ("[T]he ameliorative purpose of § 212(c) is better served by permitting a minor to establish domicile through a parent with whom he had a significant

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been convicted of an aggravated felony, whereas Section 1182(c), as amended in 1990, barred relief only for those aliens who had served a term of imprisonment of at least five years. See *St. Cyr*, 533 U.S. at 297.

Second, IIRIRA resolved a disagreement among the circuits as to whether the requirement of "a lawful unrelinquished domicile of seven consecutive years" referred to lawful permanent resident status or to *any* lawful status, including non-permanent residence. The BIA, the Fourth Circuit, and the Tenth Circuit had held that only lawful permanent resident status counted. See *In re S.*, 5 I. & N. Dec. 116, 117-118 (BIA 1953), *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 249 (4th Cir. 1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990). The Ninth Circuit initially agreed (*Castillo-Felix* v. *INS* 601 F.2d 459, 467 (9th Cir. 1979)), but then reversed course, finding that non-permanent residents could also qualify (*Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995)). The Second, Fifth, and Seventh Circuits likewise held that non-permanent residents were eligible for a Section 1182(c) waiver. *Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977); *Castellon-Contreras* v. *INS*, 45 F.3d 149, 152-154 (7th Cir. 1995); *White* v. *INS*, 75 F.3d 213, 216 (5th Cir. 1996). Section 1229b(a) resolved this disagreement by requiring seven years of residency under any legal status and five years of lawful permanent residence. See *Cuevas-Gaspar*, 430 F.3d at 1027. The Department of Justice explained that a substantially similar earlier amendment was intended to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082-04, S6104 (1995).

relationship during the time in question."); *Morel* v. *INS*, 90 F.3d 833, 841 (3d Cir. 1996) ("domicile of a parent may be imputed to his or her child for purposes of determining whether the child has met the seven year domicile requirement of section 212(c)"); *Lepe-Guitron*, 16 F.3d at 1026 ("parents' 'lawful unrelinquished domicile' should be imputed to their minor children" under Section 1182(c)).

Accordingly, at the time that Section 1229b replaced the former provision, imputation of a parent's status to an unemancipated minor for purposes of relief from removal eligibility was settled. Therefore, "because Congress has left undisturbed through subsequent reenactments" of this provision "the principles" that had been "established" in prior cases, it must be "presume[d] that Congress intended to codify these principles." *Cottage Sav. Ass'n*, 499 U.S. at 562. See also *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002); 2B Norman J. Singer & J.D. Shambie Sinter, *Sutherland Statutory Construction* § 49:9 (7th ed. 2007) ("Where reenactment of a statute includes a contemporaneous and practical interpretation, the practical interpretation is accorded greater weight than it ordinarily receives, as it is regarded as presumptively the correct interpretation of the law."). This presumption should take on special force here as Congress *did* expressly amend other elements of the statute to displace the rule stated by certain judicial decisions. See, *supra*, 14 n.7.

Of course, the new statute does use the term "resided" rather than "domiciled," and the government points to this distinction in contending that Congress could not have meant to validate the imputation rule. *Gutierrez* Pet. 15-17. This is so, the government argues, because domicile contains an intent compo-

nent but residence does not, which makes imputation inappropriate with respect to the latter. *Id.* at 16-17. This argument is a new one for the government. As the Third Circuit noted in *Augustin*, one of the decisions upon which the government here relies, "[t]he government has not contended before us that Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation, and IIRIRA's legislative history does not provide support for such an inference. Accordingly, we decline to speculate along those lines." 520 F.3d at 269 n.5.

The government's past squeamishness in making this argument is understandable: It misapprehends the imputation that occurred under Section 1182(c). Under that provision, the "seven years of lawful unrelinquished domicile" necessarily required a lawful *admission* to this country, for until there was such an admission there could be no "*lawful* * * * domicile." See *Cuevas-Gaspar*, 430 F.3d at 1026. Thus, the courts necessarily were imputing the parent's admission and resulting status—not simply the parent's intent—to an alien seeking cancellation of removal. In re-enacting the cancellation-of-removal provision without disallowing such imputation, Congress therefore is best understood to have authorized the imputation rule.

3. There is no basis for deferring to the views of the BIA with respect to imputation because the Board has taken wildly inconsistent positions on this issue, which negates the credibility of its pronouncements about the provision. There can be little doubt that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417

(1993). See also *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("[I]nconsistency * * * in itself weakens any argument that the Board's interpretation is entitled to some weight."). While *any* inconsistency "considerably" undercuts the deference owed to an agency's "interpretation" of a statute (*INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)), "[*u*]*nexplained* inconsistency" is an especially strong indicator of "arbitrary and capricious" reasoning (*Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added)) that precludes deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001). And an agency's consistency in application of the law applies not just to singular statutory provisions, but to parallel areas of the statutes it administers. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (Congress is presumed to have intended to create coherent regulatory schemes.).

That principle governs here because, in other contexts, the BIA has recognized that imputation of parents' intent, state of mind, or legal status to their minor children *is* appropriate because children lack the capacity to navigate the immigration process or apply for certain forms of relief. For example, in *Senica* v. *INS*, 16 F.3d 1013 (9th Cir. 1994), the court affirmed the BIA's conclusion that children could not receive discretionary relief from deportation under the exception for "immigrants * * * unaware of their ineligibility for admission * * * who could not have discovered the ineligibility by exercise of reasonable diligence." *Id.* at 1014. Although the plain words of the statute seemed to apply to the children at issue, the BIA determined that their mother's lack of diligence in discovering their ineligibility should be im-

puted to them. In so holding, the Board recognized that children are, practically speaking, incapable of navigating the immigration system without the aid of their parents. See also *In re Winkens*, 15 I. & N. Dec. 451-452 (BIA 1975) (imputing a parent's abandonment of lawful permanent resident status to children); *In re Huang*, 19 I. & N. Dec. 749, 755 (BIA 1988) (same); *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998) (imputing parents' "firm resettlement" to children).

The government attempts to distinguish these rulings by noting that they all concern imputation of a state of mind, whereas "the criteria at issue here—'residence,' 'admission,' and 'status'—depend solely on an individual's objective conduct or status, coupled with some official action by the government, without regard to mental state—a fact with which the Ninth Circuit has failed to grapple." *Gutierrez* Pet. 19. But the Ninth Circuit declined to address this fact for the simple reason that the BIA's decisions never suggested that imputation was tied solely to a state of mind. Rather, the Board recognized that children lack the *capacity* to navigate the immigration process by themselves.

For example, in *Senica*, the Board could have ruled merely that the mother's actual knowledge of her ineligibility for admission should be imputed to her children (it was uncontested that she had such knowledge). But instead of basing its ruling on imputed knowledge, the Board imputed capacity, a status that, like residence, is objective: "'reasonable diligence' under § 212(k) should be determined by considering what the parent could have ascertained by the exercise of reasonable diligence, rather than considering what the minor children could have discov-

ered." *Senica*, 16 F.3d at 1015. Similarly, in *In re Winkens*, the alien had "testified that he had not wanted to leave but that [* * *] there was no way [he] could stay by [him]self." 15 I. & N. Dec. at 451. Yet, despite the alien's intent, the Board concluded that the "abandonment of [his parents'] lawful permanent resident status is imputed to the respondent, who was subject to their custody and control." *Id.* at 452. Thus, the BIA has repeatedly held that parents' status should be imputed to their minor children where that status depends on capacities that the children do not possess.

Moreover, the distinction drawn by the government is implausible and artificial: "[m]ental states" can be demonstrated only through incidents of "objective conduct." See, *e.g.*, *In re Huang*, 19 I. & N. Dec. at 755 ("While the applicant's professed intent was to return to the United States, her actions have not supported that intent."). So while it is true that respondent did not "objectively" follow the procedure necessary to adjust his status at the same time as did his mother, one could just as easily conclude that, as a child, he lacked the legal or mental capacity to do so.

Nor is "some official action by the government" significant to this case, because the government action at issue—adjustment of residence status—is often automatic for children of permanent residents. 8 U.S.C. § 1153(a)(2). The single variable that is most likely to determine whether the child of a lawful permanent resident is admitted is not the action of an immigration officer, but rather a parent's action in applying (or not applying) for adjustment of the child's status. The Board was thus incorrect in making the blanket statement that "admission does not

depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." *Gutierrez* Pet. App. 14a. As a practical matter it is precisely the minor's lack of intent and capacity that is most likely to prevent the alien from being lawfully admitted. *Cf. Deus*, 591 F.3d at 808 ("Her mother was granted permanent resident status * * * when Deus was one year old.").[8]

4. To the extent that there is ambiguity here, the presumption that the INA is designed to keep families intact, together with the canon that ambiguities in the INA must be construed in favor of the alien, both compel the result reached below.

In several contexts, as the Third Circuit recognized, the INA is designed to favor the unification of families. See *Augustin*, 520 F.2d at 270; see also *Cuevas-Gaspar*, 430 F.3d at 1023. And as the Ninth Circuit has explained, families have special preferences for visas (8 U.S.C. §§ 1152 & 1153), and waivers are available for certain aliens who assist their children in entering the United States unlawfully (*id.* § 1182(a)(6)(E)(ii)). This observation provides substantial reason to believe that the INA permits imputation of the status of a parent to a child. The rule that the government urges, in contrast, would disrupt families simply because a parent failed to timely complete an unemancipated minor's application for adjustment of status.

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[8] There has never been a suggestion, either by respondent or the Ninth Circuit, that imputation would be proper even if the child were not a qualified immigrant. These cases address only the situation in which the child could have (and presumably would have) been admitted but for a failure to satisfy a simple administrative procedure.

Similarly, "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" further compels the result reached below. See *Cardoza-Fonseca*, 480 U.S. at 449. In the face of an ambiguous statute, it is error for the BIA to choose a rule adverse to an alien seeking to avoid deportation.

Ultimately, "it would be unreasonable to hold an adolescent responsible for failing to arrange permanent resettlement." *Cuevas-Gaspar*, 430 F.3d at 1024 (quotation omitted). Congress did not intend to penalize unemancipated minors for a parent's failure to apply for appropriate immigration relief. Yet that would be the effect of the government's rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

Nos. 10-1542 and 10-1543

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

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v.

DAMIEN ANTONIO SAWYERS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Despite a clear conflict with other courts of appeals, the Ninth Circuit has refused to reconsider its rule permitting an alien to "impute" his parent's period of residence after having acquired lawful permanent resident (LPR) status, or after having been admitted in any status, to gain his own eligibility for cancellation-of-removal relief. That imputation rule finds no support in the statutory language and is contrary to the interpretation of the Board of Immigration Appeals (Board). Con-

trary to respondents' contentions, these two cases together provide the Court an appropriate vehicle to correct the Ninth Circuit's course and restore uniformity in the availability of this form of immigration relief.

A. The Ninth Circuit's Decisions Are Incorrect

The cancellation-of-removal statute, 8 U.S.C. 1229b(a), requires (in relevant part) that "the alien" "(1) ha[ve] been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) ha[ve] resided in the United States continuously for 7 years after having been admitted in any status." The Ninth Circuit permits circumvention of those requirements by allowing an alien to impute to himself the years of lawful residence and LPR status accrued by someone else—the alien's parent. As explained in the *Gutierrez* petition (at 9-19), the Ninth Circuit's imputation rule is contrary to the plain language of the statute and the Board's authoritative interpretation, both of which require that "the alien" *personally* satisfy Section 1229b(a)'s requirements. Respondents' contrary arguments fail.

1. Contrary to Sawyers's contention (Br. in Opp. 12-13), Section 1229b(a)'s lack of an express bar on imputation is not tantamount to permitting imputation or even to leaving the issue open for agency resolution. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see *Pruidze* v. *Holder*, 632 F.3d 234, 240 (6th Cir. 2011) (explaining that statutory silence does not always indicate a "gap to fill"). Nothing in Section 1229b(a) nor in the broader statutory context suggests that Congress intended to permit cancellation-of-removal relief for aliens who do

not themselves satisfy the statute's express eligibility requirements. See *Gutierrez* Pet. 9-14.

2. Because Section 1229b(a)'s language leaves no room for the Ninth Circuit's imputation rule, respondents' reliance (*Sawyers* Br. in Opp. 14-16; *Gutierrez* Br. in. Opp. 13-17) on the legislative history and legal context underlying the enactment of Section 1229b(a) as a replacement for former 8 U.S.C. 1182(c) (1994) is misplaced. See, *e.g.*, *Schindler Elevator Corp.* v. *United States*, 131 S. Ct. 1885, 1893 (2011) ("In interpreting a statute, [the Court's] inquiry must cease if the statutory language is unambiguous.") (citations and internal quotation marks omitted).

In any event, respondents' argument that it was "settled" (*Sawyers* Br. in Opp. 16) that the previous domicile-based statute permitted imputation is irrelevant. The residency requirement in Section 1229b(a) fundamentally differs from the intent-based domicile requirement under former Section 1182(c) that originally led to the Ninth Circuit's imputation rule.[1] *Gutierrez* Pet. 15-17; see 8 U.S.C. 1101(a)(33) (defining "residence" to be "without regard to intent").[2] As respondents ac-

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[1] Sawyers (Br. in Opp. 17) is mistaken in contending that the Ninth Circuit had held that imputation under former Section 1182(c) applied not only to domicile but also to a parent's admission and lawful status. See *Gutierrez* Pet. 17 (analyzing *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (1994)). In any event, such a holding would have been incorrect for the same reasons the decisions below are incorrect.

[2] Gutierrez (Br. in Opp. 16) relies on *Martinez* v. *Bynum*, 461 U.S. 321, 330-331 (1983), for the proposition that "residence traditionally includes an element of intent." But see *id.* at 330 (noting that "the meaning [of 'residence'] may vary according to context"). Even if that were "traditionally" the case, the definition of "residence" under the immigration laws, as quoted in the text, expressly makes intent irrelevant.

knowledge, the Section 1182(c) cases reasoned that "because most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Gutierrez* Br. in Opp. 13-14 (citations and internal quotation marks omitted). There is no similar intent-based requirement in Section 1229b(a) to support the use of imputation for cancellation of removal. Whether "Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation" (*Sawyers* Br. in Opp. 17) or for some other purpose (*Gutierrez* Br. in Opp. 14-15) is beside the point; the pertinent fact is that there is no longer any intent-based requirement on which imputation can be predicated. Respondents' contention (*Sawyers* Br. in Opp. 17; see *Gutierrez* Br. in Opp. 15) that Congress "authorized the imputation rule" therefore lacks any support in the text or legislative history; indeed, respondents cite no evidence that Congress approved of imputation under the old (let alone the new) statute.

3. Even assuming ambiguity as to the permissibility of imputation, respondents' attempt (*Gutierrez* Br. in Opp. 19-20; *Sawyers* Br. in Opp. 17-20) to deny *Chevron* deference to the Board's interpretation of Section 1229b(a), as set out in published decisions, lacks merit. Respondents nowhere contend (nor could they contend) that the Board's interpretation rejecting imputation is foreclosed by the terms of the statute. Although respondents assert that the Board's interpretation is not entitled to *Chevron* deference because the Board has been "inconsistent" (*Sawyers* Br. in Opp. 17), they cite only instances in which the Board has permitted imputation "in other contexts" under different statutory provisions. *Id.* at 17-20; *Gutierrez* Br. in Opp. 18-20 (citing cases

involving imputation as to "firm[] resettle[ment]"; "abandonment"; and "knowledge of inadmissibility"). As the government's certiorari petition in *Gutierrez* explains (at 19), those other contexts (unlike this one) involved intent or "state of mind" requirements which the Board reasonably determined should not be ascertained based on the minor alien alone. The Board has been consistent in its rejection of imputation of objective legal status under Section 1229b(a) and has explained its reasoned (and reasonable) rejection of the Ninth Circuit's contrary rule in detail. *Gutierrez* Pet. 14-15; see, *e.g.*, *In re Escobar*, 24 I. & N. Dec. 231, 232-235 (B.I.A. 2007).

4. Contrary to respondents' suggestion (*Sawyers* Br. in Opp. 21-22; *Gutierrez* Br. in Opp. 20-22), a general Congressional preference for preserving family unity—in particular, keeping parents together with unemancipated minor children—does not trump the terms of Section 1229b(a), as authoritatively interpreted by the Board. To begin with, respondents are not unemancipated minors seeking to reunite or remain with their parents in the United States; they are adults seeking to avoid removal, after committing removable offenses, by retroactively availing themselves of their parents' residence and status. *Gutierrez* Pet. 4, 12-13; *Sawyers* Pet. 3-4. In any event, as explained in the *Gutierrez* petition (at 18-19), that preference is not absolute. For example, when Gutierrez was admitted as a lawful permanent resident in October 2003, children of lawful permanent residents immigrating from Mexico had to wait over seven years (ten years if over the age of 21) for a visa. See U.S. Dep't of State, *Visa Bulletin for October 2003*,

http://www.travel.state.gov/visa/bulletin/bulletin2985.html.[3]

B. The Questions Presented Warrant Immediate Review

1. The conflict among the courts of appeals warrants this Court's review. As Sawyers concedes (Br. in Opp. 9), the Ninth Circuit's rule permitting imputation to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement squarely conflicts with the Fifth Circuit's decision in *Deus* v. *Holder*, 591 F.3d 807, 811-812 (2009). That conflict alone is sufficient to warrant this Court's review, especially in light of the Ninth Circuit's considered refusal to revisit its erroneous imputation rule notwithstanding the conflict. See *Gutierrez* Pet. 20-21.

Sawyers attempts (Br. in Opp. 9-10) to distinguish the Third Circuit's conflicting decision in *Augustin* v. *Attorney General of the United States*, 520 F.3d 264 (2008), on the ground that the alien in that case was not physically present in the United States for the requisite period. The Third Circuit's decision, however, rejects the Ninth Circuit's reasoning separate and apart from that ground. See *id.* at 270-271 (rejecting various aspects of the Ninth Circuit's reasoning); see also *Deus*, 591 F.3d at 811 (noting that although *Augustin* might have rested in part on the fact that the alien did not re-

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[3] For that reason, the delay in alien children obtaining LPR status may be attributable in certain cases to the waiting time for immigrant visas and not to any decision on the part of the alien's parents. Contrary to Sawyers's suggestion (Br. in Opp. 20-21), however, the Ninth Circuit's imputation rule does not require a court to examine the reasons why an alien did not obtain LPR status when his parent obtained that status. Nor does the statute provide any basis for such an inquiry. Cf. *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1115-1116 (9th Cir. 2009) (Graber, J., concurring).

side in the United States during the relevant period, "the Third Circuit also rejected other arguments that form the basis of the *Cuevas-Gaspar* decision"). In light of the Fourth Circuit's similar disagreement with the imputation rule, see *Cervantes* v. *Holder*, 597 F.3d 229, 236 (2010) (in dicta), three courts of appeals have now expressly rejected the Ninth Circuit's approach.

2. Although Gutierrez is technically correct in arguing (Br. in Opp. 8-9) that the circuit conflict described above involves the seven-year continuous residence requirement of Section 1229b(a)(2), the Third, Fourth, and Fifth Circuits' rejection of imputation in that context logically entails rejection of imputation in the context of the five-year LPR status requirement of Section 1229b(a)(1). The Ninth Circuit's basis for extending imputation to Section 1229b(a)(1) was its "controlling precedent" in *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (2005), permitting imputation under Section 1229b(a)(2). See *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1109 (2009). Tellingly, neither the Ninth Circuit nor respondents provide any potential basis for permitting imputation under Section 1229b(a)(2) but not 1229b(a)(1) (or vice versa). Because the same (erroneous) Ninth Circuit precedents underlie both requirements, it makes sense for the Court to consider them together rather than await a separate (but inevitable) rejection by other courts of imputation under Section 1229b(a)(1) as well. To the extent the Court agrees with Gutierrez that his case presents only the Section 1229b(a)(1) issue,[4] the

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[4] Gutierrez takes too narrow a view of the proceedings below when asserting (Br. in Opp. 7-8) that a challenge to the use of imputation to meet Section 1229b(a)(2)'s seven-year continuous residence requirement is not presented in his case. Neither party disputed below that, without imputation, Gutierrez cannot meet *either* statutory require-

Court can safely reach both issues by granting both petitions. Indeed, that is a significant reason why the government has sought certiorari in these two cases together. See *Gutierrez* Pet. 21 n.4; *Sawyers* Pet. 7 n.2.[5]

3. Nor is further "percolation" (*Sawyers* Br. in Opp. 11; *Gutierrez* Br. in Opp. 11) warranted to allow the lower courts to address the full range of possible circumstances. The government's position is that imputation under Section 1229b(a) is impermissible *regardless* of the alien's circumstances. For example, the government's position is that imputation is not available even where the alien has continuously resided with his parents for the requisite period and has become an LPR himself before or upon reaching the age of majority (see *Sawyers* Br. in Opp. 11-12 & n.5).

4. Sawyers argues (Br. in Opp. 6) that "it is not evident that the issue here arises with great frequency." Although the government does not have comprehensive

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ment at issue. *E.g.*, *Gutierrez* Pet. App. 20a-21a. Because the Ninth Circuit already had held imputation must be allowed for purposes of Section 1229b(a)(2) at the time of the immigration proceedings, the immigration judge and the Board focused on the Section 1229b(a)(1) requirement. But in that process the Board criticized the Ninth Circuit's decision in *Cuevas-Gaspar* permitting imputation under Section 1229b(a)(2). *Id.* at 14a-15a. On petition for review to the Ninth Circuit, the government argued that "the cancellation statute does not permit imputation under any circumstances." Gov't C.A. Br. 13. Given the interrelated nature of the issues and the procedural posture, that is sufficient to allow this Court to reach the Section 1229b(a)(1) issue even in Gutierrez's case.

[5] Although Gutierrez suggests (at 10-11) that the Court should take up the imputation issue in the Temporary Protected Status context instead, he alleges no conflict under that statute, and the courts of appeals have (correctly) rejected imputation in that context. See *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341 (3d Cir. 2010); *Cervantes*, *supra*.

data, the Ninth Circuit, relying on its published decisions in *Mercado-Zazueta* and *Cuevas-Gaspar*, has decided in 2011 alone at least 11 cases (in addition to these two) raising the same issues. See *Rodriguez* v. *Holder*, No. 07-73224, 2011 WL 2412555 (June 16, 2011); *Mendiola-Sanchez* v. *Holder*, No. 08-71522, 2011 WL 2259812 (June 9, 2011); *Pimentel-Ornelas* v. *Holder*, No. 09-70437, 2011 WL 1762572 (May 10, 2011); *Portillo* v. *Holder*, No. 09-70334, 2011 WL 1762573 (May 10, 2011); *Fernandez* v. *Holder*, No. 08-71372, 2011 WL 1770855 (May 10, 2011); *De Hernandez* v. *Holder*, No. 08-71124, 2011 WL 1747993 (May 9, 2011); *Camacho* v. *Holder*, 412 Fed. Appx. 32 (2011); *Gallardo-Sanchez* v. *Holder*, 411 Fed. Appx. 102 (2011); *Becerra* v. *Holder*, 411 Fed. Appx. 67 (2011); *Guardiano* v. *Holder*, 411 Fed. Appx. 74 (2011); *Hernandez Barron* v. *Holder*, 411 Fed. Appx. 85 (2011). Indeed, since filing the two present petitions in June 2011, the government has filed three more petitions for certiorari raising the same issues and suggesting that those petitions be held pending disposition of the two petitions here. *Holder* v. *Mojica*, No. 11-99 (filed July 25, 2011); *Holder* v. *Camacho*, No. 11-103 (filed July 25, 2011); *Holder* v. *Becerra*, No. 11-104 (filed July 25, 2011).[6] And, of course, the issue has arisen frequently enough to generate published decisions in at least two other courts of appeals, thereby giving rise to the circuit conflict discussed above (pp. 6-7, *supra*).

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[6] We understand that the aliens in those subsequently filed petitions do not plan to file responses until the Court adjudicates these two petitions. There is thus no need to delay resolution of the present petitions; to the contrary, the resolution of these petitions will inform the proper disposition of the other three.

5. Respondents also take issue with the government's concern that the imputation rule impedes the execution of its priority goal of removing criminal aliens. Respondents contend that the concern is overstated because, notwithstanding a finding of eligibility based on imputation, immigration judges "remain free to deny relief" to aliens convicted of sufficiently "grave" offenses at the discretionary stage of the inquiry. *Gutierrez* Br. in Opp. 11-12; see *Sawyers* Br. in Opp. 6-7.

Under current procedures, however, immigration judges are not as "free" as respondents suggest to deny relief to statutorily eligible aliens. An immigration judge cannot, for example, simply deny an application based on the nature of the alien's criminal conviction. Rather, the immigration judge must consider all the applicable required factors set out in *In re C-V-T-*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998). See, *e.g.*, *Zheng* v. *Holder*, 644 F.3d 829, 833 (9th Cir. 2011) ("[T]he BIA abuses its discretion when it fails to consider all favorable and unfavorable factors bearing on a petitioner's application for [discretionary] relief."); *In re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 204 (B.I.A. 2001) ("[A] complete review of the favorable factors in the case is required.") (citation and internal quotation marks omitted). That process may require an evidentiary hearing and additional detention pending further proceedings. The process thus imposes a burden on both immigration judges and the Board, as well as on the Department of Homeland Security in presenting the cases, and delays the removal of certain criminal aliens (those who would be statutorily ineligible for cancellation without imputation) to whom discretionary relief is ultimately denied. And in Gutierrez's case, the imputation issue is dispositive of his removability, as the immigration judge

granted him cancellation of removal (*Gutierrez* Pet. App. 22a-27a).

In any event, this Court recently has granted review on questions of eligibility for discretionary relief under the immigration laws. See, *e.g.*, *Judulang* v. *Holder*, No. 10-694 (to be argued Oct. 12, 2011) (presenting question whether alien meets threshold eligibility criteria for discretionary relief under former 8 U.S.C. 1182(c), one of Section 1229b(a)'s predecessors); *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010) (examining whether alien's criminal acts constituted an aggravated felony rendering him ineligible for discretionary cancellation of removal under Section 1229b(a)). Although *Judulang* and *Carachuri-Rosendo* arose from petitions by aliens from decisions restricting eligibility for discretionary relief, the identity of the petitioner should not matter, especially where (as here) a circuit conflict exists. Indeed, these cases are no less worthy of further review from the perspective of aliens outside the Ninth Circuit for whom imputation is not available to satisfy Section 1229b(a)'s eligibility requirements.

* * *

For the foregoing reasons and those stated in the petitions for a writ of certiorari, the petitions should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2011

No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 23, 2011
CERTIORARI GRANTED: SEPT. 27, 2011

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-70181

DAMIEN ANTONIO SAWYERS, A.K.A. DAMIEN SAWYERS,
PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/15/08	1	FILED * * * FAXED * * * INS Petition for REV and Motion for Stay. Docketed Cause and Entered Appearance of Counsel. Pursuant to G.O. 6.4(c)(1)(3) A TEMPORARY STAY OF REMOVAL IS IN EFFECT pending further order. The schedule is set as follows: Pursuant to G.O. 6.4(c)(1)(3), the schedule is set as follows: Cert. Admin. Record due 3/11/08 Response to motion for stay due 4/8/08 for

DATE	DOCKET NUMBER	PROCEEDINGS
		Michael B. Mukasey (MOATT) [08-70181] (GN)
1/15/08	2	Filed Petitioner Damien Antonio Sawyers's * * * FAXED * * * * motion to stay deportation (see schedule above) [08-70181] served on 1/15/08 [6400381] (MOATT) [08-70181] (GN)
3/17/08	3	Electronic Certified Administrative Record Filed. Number of Disks (CD-ROMs or DVDs): 1. (KS)
4/14/08	4	Filed appearance notice of Attorney(s) Arthur L. Rabin for party(s) Respondent Michael B. Mukasey, in case 08-70181. Served on 04/11/2008. (JE)
4/14/08	5	Filed Respondent Michael B. Mukasey response opposing appellant motion to stay removal. Served on 04/11/2008. (JE)

DATE	DOCKET NUMBER	PROCEEDINGS
6/2/08	6	Filed order MOATT: (HS) docket fee due; within 21 days after the date of this order, petitioner shall pay to this court the $450.00 filing fee for this petition for review. Failure to pay the fee shall result in the automatic dismissal of the petition for review by the Clerk for failure to prosecute. See 9th Cir. R. 42-1. All pending motions are held in abeyance pending further order of the court. (DAF)
6/11/08	7	Received notification from Petitioner of payment of docket fee. Amount Paid: USD 450. Date paid: 06/11/2008. (MT)
8/13/08	8	Filed order (WILLIAM C. CANBY and EDWARD LEAVY): The motion for a stay of removal is granted. The certified administrative record has been filed. The opening brief is due November 13, 2008; the answering brief is due January 12,

DATE	DOCKET NUMBER	PROCEEDINGS
		2009; and the optional reply brief is due within 14 days after service of the answering brief. (AF)
11/12/08	9	14 day oral extension by phone of time to file Petitioner Damien Antonio Sawyers brief. Petitioner brief due 11/28/2008 for Damien Antonio Sawyers. Respondent brief due 01/27/2009 for Michael B. Mukasey, Attorney General. The optional reply brief is due 14 days after service of the respondent brief. (TH)
11/28/08	10	Received original and 15 copies of Petitioner Damien Antonio Sawyers brief (Informal: No) 8 pages. Served on 11/25/2008. Deficiency: Footnotes font too small. Notified counsel. (LA)
1/27/09	11	Filed (ECF) notice of appearance of Kathryn Marie McKinney for Respondent Michael B. Mukasey. Date

DATE	DOCKET NUMBER	PROCEEDINGS
		of service: 01/27/2009. [6785706] (KM)
1/27/09	12	Added attorney Kathryn McKinney for Michael B. Mukasey, in case 08-70181. (CW)
1/27/09	13	Terminated Arthur Leonid Rabin for Michael B. Mukasey in 08-70181 (CW)
1/27/09	14	Submitted (ECF) Answering brief for review. Submitted by Respondent Michael B. Mukasey. Date of service: 01/27/2009. [6786346] (O)
1/29/09	15	Order filed (Deputy Clerk: KKW) Dismissing case for failure to prosecute (Cir. Rule 42-1) Pursuant to Ninth Rule 42-1, this appeal is dismissed for failure to file opening brief.; This order served on the district court shall act as and for the mandate of this court.. (KKW)
2/3/09	16	Filed (ECF) Petitioner Damien Antonio Sawyers motion for reconsideration of

DATE	DOCKET NUMBER	PROCEEDINGS
		dispositive Clerk Order of 01/29/2009. Date of service: 02/03/2009. [6794826] (HFL)
2/5/09	17	Deleted Incorrect Docket Entry. (EL)
2/12/09	18	KB Filed order (Appellate Commissioner) The petitioner's motion to reconsider the January 29, 2009 order is construed as a motion to reinstate. So construed, the motion is granted. The previously granted temporary stay of removal is also reinstated. The opening brief received on November 28, 2008 shall be filed. The petitioner is reminded that pursuant to Ninth Circuit Rule 32(a)(5)(A) the typeface of a brief and the footnotes of the brief must be 14-point. The answering brief submitted on January 27, 2009 shall be filed. The optional reply brief is due 14 days after the date of this order. The answering brief submitted on January 27, 2009 shall be

DATE	DOCKET NUMBER	PROCEEDINGS
		filed. The optional reply brief is due 14 days after the date of this order. (Pro Mo) (LRB)
2/12/09	19	Filed original and 15 copies of Petitioner Damien Antonio Sawyers (Informal: No) opening brief of 08 pages. Served on 11/25/2008. (GLS)
2/12/09		Filed Answering Brief filed by Michael B. Mukasey. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification that the brief is identical to the version submitted electronically. (GLS)
2/20/09	20	Received 10 paper copies of Answering brief filed by Michael B. Mukasey. One copy to Case Files, the remainder to Records. (GLS)

DATE	DOCKET NUMBER	PROCEEDINGS
6/20/09	21	Calendar check performed. [6963424] (MW)
11/2/09	22	Filed (ECF) Respondent Michael B. Mukasey Motion to stay proceedings. Date of service: 11/02/2009. [7115232] (KM)
11/25/09	23	Notice of Oral Argument on JANUARY 15, 2010 Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Please open attached documents to view details about your case. [7143656] (AM)
11/30/09	24	Filed clerk order (Deputy Clerk: KKW): On November 2, 2009, the government filed an unopposed motion to hold proceedings in abeyance pending the outcome of the petition for rehearing in Mercado-Zazueta v. Holder, 580 F.3d 1102 (9th Cir. 2009). The motion is GRANTED. This case is re-

DATE	DOCKET NUMBER	PROCEEDINGS
		moved from the oral argument calendar for January 15, 2010. When the petition for rehearing in Mercado-Zazueta is resolved, the calendar clerk shall schedule this case to be heard by the next merits panel. [7146214] (KKW)
6/30/10	26	Filed (ECF) Respondent Michael B. Mukasey citation of supplemental authorities. Date of service: 06/30/2010. [7389928] (KM)
8/11/10	27	Notice of Oral Argument on OCTOBER 8 Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [7436532] (AM)

DATE	DOCKET NUMBER	PROCEEDINGS
8/26/10	28	Filed clerk order (Deputy Clerk: AF): This case shall be submitted on the briefs and record, without oral argument, on October 8, 2010, in San Francisco, California, pursuant to Federal Rule of Appellate Procedure 34(a)(2). [7453522] (AF)
10/8/10	29	SUBMITTED ON THE BRIEFS TO ROBERT R. BEEZER, SUSAN P. GRABER and CORMAC J. CARNEY. [7501867] (TB)
10/14/10	30	FILED MEMORANDUM DISPOSITION (ROBERT R. BEEZER, SUSAN P. GRABER and CORMAC J. CARNEY) GRANTED; REMANDED. FILED AND ENTERED JUDGMENT. [7507767] (DD)
10/25/10	31	Filed (ECF) notice of appearance of Carol Federighi for Respondent Michael B. Mukasey. Date of service: 10/25/2010. [7521513] (CF)

DATE	DOCKET NUMBER	PROCEEDINGS
10/25/10	32	Added attorney Carol Federighi for Michael B. Mukasey, in case 08-70181. [7521716] (RR)
10/28/10	33	Filed (ECF) Respondent Michael B. Mukasey Unopposed Motion to extend time to file petition for rehearing until 12/20/2010. Date of service: 10/28/2010. [7525996] (CF)
10/28/10	34	Filed order (SUSAN P. GRABER) Respondent's unopposed motion for an extension of time up to and including December 20, 2010, within which to file a petition for rehearing is GRANTED. [7526846] (KKW)
12/14/10	35	Filed (ECF) Respondent Michael B. Mukasey Unopposed Motion to extend time to file petition for rehearing until 01/03/2011. Date of service: 12/14/2010. [7580095] (CF)

DATE	DOCKET NUMBER	PROCEEDINGS
12/17/10	36	Filed order (SUSAN P. GRABER): Respondent's second unopposed motion for an extension of time up to and including January 3, 2011, within which to file a petition for rehearing is GRANTED. [7584467] (AF)
1/3/11	37	Filed (ECF) Respondent Michael B. Mukasey petition for rehearing en banc (from 10/14/2010 memorandum). Date of service: 01/03/2011. [7597636] (CF)
1/5/11	38	Filed order (ROBERT R. BEEZER, SUSAN P. GRABER and CORMAC J. CARNEY) Petitioner is directed to file a response to Respondent's petition for rehearing en banc filed on January 3, 2011. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the filed date of this order. Parties who are registered for ECF must file the response electronically without

DATE	DOCKET NUMBER	PROCEEDINGS
		submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7601292] (KKW)
1/26/11	39	Filed (ECF) Petitioner Damien Antonio Sawyers response to ,to set response by any party to anything, ,for rehearing by en banc only (all active, any interested senior judges). Date of service: 01/26/2011. [7626227]. (HFL)
2/1/11	40	Filed order (ROBERT R. BEEZER, SUSAN P. GRABER and CORMAC J. CARNEY): Judge Graber has voted to deny Respondent's petition for rehearing en banc, and Judges Beezer and Carney have so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. The petition for re-

DATE	DOCKET NUMBER	PROCEEDINGS
		hearing en banc is DENIED. [7632003] (AF)
2/10/11	41	MANDATE ISSUED. (RRB, SPG and CJC) [7642924] (LC)
4/22/11	42	Received letter from the Supreme Court dated 04/20/2011 re: the application for an ext of time to file a petition for a writ of certiorari has been granted to and including 6/1/2011. [7731337] (LC)
5/27/11	43	Received letter from the Supreme Court dated 05/25/2011 re: the application for a further extension of time to file a petition for writ of certiorari has been extended to and including 6/23/2011. [7767396] (LC)
6/24/11	44	Received notice from the Supreme Court: petition for certiorari filed on 06/23/2011. Supreme Court Number 10-1543. [7797465] (LC)

DATE	DOCKET NUMBER	PROCEEDINGS
9/28/11	45	Received notice from the Supreme Court. Petition for certiorari GRANTED on 09/27/2011. Supreme Court Number 10-1543. [7908555] (LC)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Eloy, Arizona

File No.: A 44 852 478

MATTER OF DAMIEN ANTONIO SAWYERS,
RESPONDENT

Date: Dec. 19, 2006

TRANSCRIPT OF HEARING

Before: JOHN W. DAVIS, Immigration Judge

[50]

JUDGE FOR THE RECORD

This is Immigration Judge John W. Davis conducting continued—excuse me, conducting initial removal proceedings in Eloy, Arizona, on the 19th of December 2006, in the matter of Damien Antonio Sawyers, A 44 852 478. This afternoon's hearing is an individual hearing. The respondent is present in Court. He is currently detained in the custody of the Department of Homeland Security. He is represented this afternoon by Mr. Hugo Larios (phonetic sp.) of the Law Offices of Hugo Larios of Tempe, Arizona. The Department of Homeland security is represented by its Assistant Chief Coun-

sel, Mr. Matthew Kaufman (phonetic sp.). The Court's Officer is Mr. Valenzuela.

JUDGE TO MR. LARIOS

Prior to proceedings, Mr. Larios, let me ask you this. Is—have you advised your client of the nature and purpose of these proceedings, the rights available to him during these proceedings?

MR. LARIOS TO JUDGE

Yes, Your Honor.

JUDGE TO MR. LARIOS

And does he admit proper service of the Notice to Appear and that he's the person named in, in that document?

MR. LARIOS TO JUDGE

Yes, Your Honor.

JUDGE TO MR. LARIOS

[51]

Very well.

JUDGE FOR THE RECORD

I'm going to mark and admit that document as Exhibit 1. This hearing was originally scheduled for the 28th of November.

JUDGE TO MR. LARIOS

And, Mr. Larios, you requested a continuance, which the Court granted, and it was reset till today. I'm going to, I'm going to mark that request for a continuance and

the granting of it as Exhibit 2. Are you ready for pleadings, Mr. Larios?

MR. LARIOS TO JUDGE

Yes, Your Honor.

JUDGE TO MR. LARIOS

Very well. As I recall, reading your request for a continuance, you're denying factual allegation 1, is that correct?

MR. LARIOS TO JUDGE

Yes, Your Honor.

JUDGE TO MR. LARIOS

Very well. Do you have any evidence to provide to the Court or do you want to do it all at a subsequent hearing?

MR. LARIOS TO JUDGE

I have some evidence, Your Honor. May I approach?

JUDGE TO MR. LARIOS

Yes. Thank you.

MR. LARIOS TO JUDGE

[52]

Your Honor, this will be a derivative citizenship. His mother naturalized prior to his 18th birthday. He was born in 1980 and the mother was naturalized in '96.

JUDGE TO MR. LARIOS

What's the status of the father?

MR. LARIOS TO JUDGE

The status is also a U.S. citizen.

JUDGE TO MR. LARIOS

Do you have any documents showing that?

MR. LARIOS TO JUDGE

I do not.

MR. SAWYERS TO JUDGE

Yes, I do.

JUDGE TO MR. SAWYERS

Well, you need to provide those documents to Mr. Larios. And you provide those documents to Mr. Larios. He can provide them to Mr. Kaufman or whichever Government Attorney winds up handling your case and the Government will likely terminate if that's the case.

JUDGE TO MR. LARIOS

But what I'm going to do now is set it to my next available, Mr. Larios, which is going to be 10:00 on the 5th of February, if you're available.

MR. LARIOS TO JUDGE

Yes, Your Honor. And this is solely on the citizenship [53] issue?

JUDGE TO MR. LARIOS

Yes. Well, at that time, I'll take, I'll take a look at the—well, he's got him charged today with felon. It doesn't appear as though he will be.

MR. LARIOS TO JUDGE

Yes, so we would deny four and contest the aggravated felony charge, Your Honor.

JUDGE TO MR. LARIOS

But, given that that's not the case, he would be eligible—

MR. LARIOS TO JUDGE

For cancellation of removal, 42-A.

JUDGE TO MR. LARIOS

—yes, 10 years. So, he's be eligible for cancellation. So if you want to have the application at that time. I mean, he sounds rather confident that his father is going to provide him a birth certificate. So what I'm going to do, is I'm going to set it for 10:00 on the 5th, still, that's my first available. That will be for a prove-up. And what I will do is, if he provides—if Mr. Sawyers provides you the documentation, Mr. Larios, and you provide it to Mr. Kaufman or whomever—and it substantiates what Mr. Sawyers is claiming, then they'll allow you to terminate before we get back into Court.

* * * * *

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Eloy, Arizona

File No.: A 44 852 478

MATTER OF DAMIEN ANTONIO SAWYERS,
RESPONDENT

Date: Mar. 9, 2007

TRANSCRIPT OF HEARING

Before: JOHN W. DAVIS, Immigration Judge

[63]

JUDGE FOR THE RECORD

This is Immigration Judge John W. Davis conducting continued removal proceedings in Eloy, Arizona on the 9th of March, 2007, in the matter of Damien Antonio Sawyers, A 44 852 478. This morning's hearing is an individual hearing. The respondent is represented by his—actually, this is an individual hearing, and it has been set over until this morning for a prove-up on the respondent's claim to citizenship. The respondent is present in Court. He is currently detained in the custody of the Department of Homeland Security. He is represented this morning by Mr. Hugo Larios of the

Law Offices of Hugo Larios of Tempe, Arizona. The Department of Homeland Security is represented by its Assistant Chief Counsel, Mr. Alec Gizelik (phonetic sp.). The Court's Officer this morning is Officer Valenzuela. All right. At, at a prior hearing, the Court marked and admitted as Exhibit 1 the Notice to Appear. The respondent denied factual allegation 1, admitted factual allegation 2, admitted factual allegation 3, denied factual allegation 4, denied the charges of removability.

JUDGE TO MR. LARIOS

Is that correct, Mr. Larios?

MR. LARIOS TO JUDGE

Your Honor, I—

JUDGE TO MR. LARIOS

Or did we not enter pleadings to two and three? I know I [64] denied—I entered a denial to one and four. Did he admit two and three or are those in abeyance to this point?

MR. LARIOS TO JUDGE

No, no, two and three are admitted, Your Honor.

JUDGE TO MR. LARIOS

Very well.

JUDGE FOR THE RECORD

And there are two charges of removability. The first under 237(a)(2)(A)(iii), which is a aggravated felony under Section 101(a)(43)(B), which the respondent denied, as well as 237(a)(2)(B)(i), which the respondent also denied. And the matter was set over until this morning. The parties were also given leave to brief, particularly

the citizenship issue and the Court has received various documents from the parties. We will look at those at this time. First, the Court received from respondent through counsel a Motion to Terminate. I'm going to mark and admit that as Exhibit 2.

JUDGE TO MR. GIZELIK

Mr. Gizelik, did the Department receive that?

MR. GIZELIK TO JUDGE

We did, Your Honor.

JUDGE TO MR. GIZELIK

Very well.

JUDGE FOR THE RECORD

Assuming (indiscernible) actually, what I'm going to is [65] take it a little out of order.

JUDGE TO MR. LARIOS

On the 26th, Mr. Larios, the Court received the Department's opposition to the Motion to Terminate. Did you receive that?

MR. LARIOS TO JUDGE

Yes, Your Honor.

JUDGE FOR THE RECORD

I'm going to mark that as Exhibit 3.

JUDGE TO MR. LARIOS

And the Court also received documents on that date, did you receive those?

MR. LARIOS TO JUDGE

The I-213 conviction and statute?

JUDGE TO MR. LARIOS

Yes.

MR. LARIOS TO JUDGE

Yes, Your Honor.

JUDGE FOR THE RECORD

I'll mark and admit those as Exhibit 4.

JUDGE TO MR. LARIOS

Any objection to those documents?

MR. LARIOS TO JUDGE

No, Your Honor.

JUDGE TO MR. LARIOS

[66]

Very well.

MR. LARIOS TO JUDGE

Your Honor, I—when I reviewed the file, the Court's file, am I mistaken that the Government withdrew the aggravated felony charge? Do you have any notes on that?

JUDGE TO MR. LARIOS

I do not.

MR. GIZELIK TO JUDGE

Your Honor, at this point, we would withdraw it, because the statute—the conviction would not support an illicit trafficking charge, and there's a—

JUDGE TO MR. GIZELIK

That's the possession of a controlled substance, fourth degree. Yes. It doesn't look like an aggravated felony to me, but I could be mistaken.

JUDGE TO MR. LARIOS

So, if Mr. Gizelik wishes to withdraw that, I will allow him to withdraw that at this point.

MR. GIZELIK TO JUDGE

Your Honor, I believe when the NTA was drafted, it might have been an aggravated felony under New York, under the Second Circuit. I believe it was drafted in October, prior to the *Lopez* decisions requiring a trafficking element. But nevertheless, we would withdraw it.

JUDGE TO MR. GIZELIK

[67]

All right.

JUDGE TO MR. SAWYERS

Q. That means this is all—that's good news for you, Mr., Mr. Sawyers, because that makes you eligible for a type of relief if I find that you're not a citizen and I find that you've been convicted of, of that criminal offense.

JUDGE FOR THE RECORD

All right. The Court will briefly entertain argument from the parties, if the parties so choose. Otherwise, the Court is prepared to enter its rulings.

JUDGE TO MR. LARIOS

Anything further, Mr. Larios?

MR. LARIOS TO JUDGE

Your Honor, basically we rest on the, on the brief submitted, Your Honor. Basically, the respondent's position that he's a U.S. citizen is that at the time that he was born his parents were not married and therefore he is an illegitimate child, and therefore he derived the citizenship from his mother. Now, the respondent does concede, Your Honor, that subsequent to that the respondent's parents did become married.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File No.: A 44 852 478

MATTER OF DAMIEN ANTONIO SAWYERS,
RESPONDENT

Date: Sept. 20, 2007

TRANSCRIPT OF HEARING

Before: JOHN W. DAVIS, Immigration Judge

* * * * *

[102]

* * * * *

JUDGE TO MR. SAWYERS

Q. Most everybody in the family but you is a citizen. Is that right?

A. Basically. Everybody.

Q. You must be the black sheep, huh?

A. No, man.

Q. When did your parents become citizens?

A. My moms became a citizen in '95, '96.

Q. How old were you at the time?

A. Fifteen, sixteen.

Q. When did your father become a citizen?

A. 2002.

Q. Oh, so you were—how old were you at that time?

A. Twenty-two.

Q. Were your parents married that entire time?

A. They got a divorce in 2002.

Q. When did you turn, when did you turn 18?

A. They were still together.

Q. In what, what year?

MR. LARIOS TO JUDGE

[103]

In '98. March 1, '98, he was born March 1st.

JUDGE TO MR. LARIOS

Oh, he's not going to—

JUDGE TO MR. SAWYERS

Q. Your father was still a lawful permanent resident at that time. I was trying to see if you might have derived citizenship, sir, and apparently you did not.

A. Right.

Q. So, all right.

JUDGE FOR THE RECORD

I'm going to strike for identification from nine, which is the sentencing order on the 2000 conviction, and then 9-A is the statute as to the conviction documents, to show that the respondent was—go to the next tape.

(TAPE 2, marked 3)

JUDGE FOR THE RECORD

This is tape two on the 20th of September, tape three overall, in the matter of Damien Antonio Sawyers, A 44 852 478. The Court was talking about Exhibits 9 and 9-A. Nine are the conviction documents. Nine is the—includes the provision of law that the respondent was sentenced. In the interim, each of the parties has submitted briefs to the Court. I will mark the Government's, which I received on the 12th of September, as Exhibit 10.

* * * * *

SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CASE NUMBER: 0202005758

STATE OF DELEWARE

v.

DAMIEN SAWYER

ALIAS: NO ALIASES

DOB: 03/01/1980
SBI: 00477127
Criminial Action Number: IN02-02-1641
Maint Dwelling (F)

[EXHIBIT # 9]

[Filed: Aug. 17, 2007]

SENTENCING ORDER

Before: JOHN W. DAVIS, Immigration Judge

NOW THIS 9TH DAY OF AUGUST, 2002, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN02-02-1641- : TIS
MAINT DWELLING

The defendant is to pay a fine in the amount of $750.00 plus all surcharges and fees (see attachment).

Effective August 9, 2002 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 11 month(s) at supervision level 5 with credit for 7 day(s) previously served

- Suspended for 18 month(s) at supervision level 3

- Suspended after serving 6 month(s) at supervision level 3

- For 12 month(s) supervision level 2

SPECIAL CONDITIONS BY ORDER

The Defendant is to pay all financial obligations pursuant to a schedule established by probation officer.

Defendant shall be evaluated for substance abuse and follow recommendation for treatment, counseling and screening.

Forfeit weapon

NOTES

The defendant's probation may be transferred to New York.

/s/ JOHN E. BABIARZ JR.
JUDGE JOHN E. BABIARZ JR.

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
DAMIEN SAWYER
DOB: 03/01/1980
SBI: 00477127

CASE NUMBER:
0202005758

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	112.50
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	750.00
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00

VICTIM'S COM ORDERED	135.00
VIDEOPHONE FEE ORDERED	1.00
TOTAL	1,098.50

SURCHARGES

CRIM ACTION #	DESCRIPTION	AMOUNT
IN02-02-1641	DRTE	112.50
IN02-02-1641	VCF	135.00

SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELEWARE

v.

BONITA HARRIS I.D. #0202005696
SEAN JORDAN I.D. #0202005752
DAMIAN SAWYER I.D. #0202005758[-2]
VERNETT SHAW A.K.A. RICHARD SHAW I.D.
#0202005765

INDICTMENT BY THE GRAND JURY

[Filed: Apr. 8, 2001]

The Grand Jury of New Castle County charges **BONITA HARRIS, SEAN JORDAN, DAMIEN SAWYER, AND VERNETT SHAW a.k.a. RICHARD SHAW** with the following offenses;

COUNT I. A FELONY

#N [02-02-1415]

TRAFFICKING IN COCAINE in violation of Title 16, Section 4753A(a)(2)(a) of the Delaware Code of 1974, as amended.

SEAN JORDAN, on or about the 7th day of February, 2002, in the County of New Castle, State of Delaware, did knowingly possess more than 5 grams but less

than 50 grams of a mixture containing Cocaine, a Narcotic Schedule II Controlled Substance as classified under 16 Del. C. Section 4716(b)(4).

COUNT II. A FELONY

#N [02-02-1416]

POSSESSION WITH INTENT TO DELIVER A NARCOTIC SCHEDULE II CONTROLLED SUBSTANCE in violation of Title 16, Section 4751 of the Delaware Code of 1974, as amended.

SEAN JORDAN, on or about the 7th day of February, 2002 in the County of New Castle, State of Delaware, did knowingly and unlawfully possess Cocaine, a Narcotic Schedule II Controlled Substance as classified under 16 Del. C. Section 4716(b)(4), with the intent to deliver same.

COUNT III. A FELONY

#N [02-02-1638]

TRAFFICKING IN COCAINE in violation of Title 16, Section 4753A(a)(2)(a) of the Delaware Code of 1974, as amended.

DAMIAN SAWYER, on or about the 7th day of February, 2002, in the County of New Castle, state at Delaware, die knowingly possess more than 5 grams but less than 50 grams of a mixture containing Cocaine, a Narcotic Schedule II Controlled Substance as classified under 16 Del. C. Section 47I6(b)(4).

COUNT IV. A FELONY

#N [02-02 .340]

POSSESSION WITH INTENT TO DELIVER A NARCOTIC SCHEDULE II CONTROLLED SUBSTANCE in violation of Title 16, Section 4751 of the Delaware Code of 1974) as amended.

DAMIAN SAWYER, on or about the 7th day of February, 2002 in the County of New Castle, Stale of Delaware, did knowingly and unlawfully possess Cocaine, a Narcotic Schedule II Controlled Substance as classified under 16 Del. C. Section 4716(b)(4), with the intent to deliver same.

COUNT V. A FELONY

#N [02-02-1443]

#N [02-02-1467]

#N [02-02-2270]

#N [02-02-1473]

POSSESSION WITH INTENT TO DELIVER A NON-NARCOTIC SCHEDULE I CONTROLLED SUBSTANCE in violation of Title 16, Section 4752 of the Delaware Code of 1974, as amended.

BONITA HARRIS, SEAN JORDAN, DAMIAN SAWYER AND VERNETT SHAW a.k.a. RICHARD SHAW, on or about the 7th day of February, 2002, in the County of New Castle, State of Delaware, did knowingly and unlawfully possess Marijuana, a Non-Narcotic Schedule I Controlled Substance as classified under 16 Del. C. Section 4714(d)(19), with the intent to deliver same.

COUNT VI. A FELONY

#N [02-02-1444]

#N [02-02-1418]

#N [02-02-1641]

#N [02-02-1474]

MAINTAINING A DWELLING FOR KEEPING CONTROLLED SUBSTANCES in violation of Title 16, Section 4755(a)(5) of the Delaware Code of 1974, as amended.

BONITA HARRIS, SEAN JORDAN, DAMIAN SAWYER, AND VERNETT SHAW a.k.a. RICHARD SHAW, on or about the 7th day of February, 2002, in the County of New Castle, State of Delaware, did knowingly keep a dwelling at [address] which is used for keeping controlled substances in violation of Chapter 47, Title 16 of the Delaware Code of 1974, as amended, as set forth in Counts I and/or II and/or III and/or IV and/or V of this Indictment.

COUNT VII. A FELONY

#N [02-02-1445]

#N [02-02-1419]

#N [02-02-1642]

#N [02-02-1475]

CONSPIRACY SECOND DEGREE in violation of Title 11, Section 512 of the Delaware Code of 1974, as amended.

BONITA HARRIS, SEAN JORDAN, DAMIAN SAWYER, AND VERNETT SHAW a.k.a. RICHARD

SHAW, on or about the 7th day of February, 2002, in the County of New Castle, State of Delaware, when intending to promote the commission of a Felony, did agree with each other to engage in conduct constituting the felony of **Possession With Intent to Deliver Marijuana and/or Maintaining a Vehicle for Keeping Controlled Substances** and did commit an overt act in furtherance of said conspiracy, by committing same as set forth in Counts V and/or VI of this Indictment, incorporated herein by reference.

COUNT VIII. A MISDEMEANOR

#N [02-02-2269]

#N [02-02-1420]

#N [02-02-2271]

#N [02-02-2272]

POSSESSION OF DRUG PARAPHERNALIA in violation of Title 16, Section 4771 of the Delaware Code of 1974, as amended.

BONITA HARRIS, SEAN JORDAN, DAMIAN SAWYER, AND VERNETT SHAW a.k.a. RICHARD SHAW, on or about the 7th day of February, 2002, in the County of New Castle, State of Delaware, did possess with intent to use drug paraphernalia to **store, weigh and/or inject** into the human body a controlled substance in violation of Chapter 47, Title 16 of the Delaware Code of 1974, as amended.

COUNT IX. A FELONY

#N [02-02-2271]

POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY in violation of Title 11, Section 1447A of the Delaware Code of 1974, as amended.

DAMIAN SAWYER, on or about the 7th day of February, 2002, in the County of New Castle, State of Delaware, did knowingly possess a firearm during the commission of Trafficking in Cociane [*sic*] and/or Possession With Intent to Deliver Cocaine andlor Possession wtrh Intent to Deliver Marijuana and/or Maintaining a Dwelling for Keeping Controlled Substances.

A TRUE BILL

/s/ ILLEGIBLE
(FOREPERSON)

/s/ M. JANE BRADY
ATTORNEY GENERAL

/s/ ILLEGIBLE
DEPUTY ATTORNEY GENERAL

Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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In the Supreme Court of the United States

No. 10-1542

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

No. 10-1543

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *Holder* v. *Gutierrez*, No. 10-1542 (*Gutierrez* Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (*Gutierrez* Pet. App. 5a-6a, 12a-16a) and the immigration judge (*Gutierrez* Pet. App. 7a-9a, 17a-27a) are unreported.

The opinion of the court of appeals in *Holder* v. *Sawyers*, No. 10-1543 (*Sawyers* Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (*Sawyers* Pet. App. 5a-8a) and the immigration judge (*Sawyers* Pet. App. 9a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals in *Gutierrez* was entered on January 24, 2011. On April 18, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari in *Gutierrez* to May 24, 2011. On May 17, 2011, Justice Kennedy further extended the time to June 23, 2011, and the petition was filed on that date. The petition for a writ of certiorari in *Gutierrez* was granted on September 27, 2011, and the case was consolidated with *Sawyers* for oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Sawyers* was entered on October 14, 2010. A petition for rehearing was denied on February 1, 2011 (*Sawyers* Pet. App. 3a). On April 20, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari in *Sawyers* to June 1, 2011. On May 25, 2011, Justice Kennedy further extended the time to June 23, 2011, and the petition was filed on that date. The petition for a writ of certiorari in *Sawyers* was granted on September 27, 2011, and the case was consolidated with *Gutierrez* for oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident (LPR) alien as follows:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a).

The INA defines the phrase "lawfully admitted for permanent residence," as used in Subsection (a)(1), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The INA defines "residence," the noun form of the term "resided" used in Subsection (a)(2), as the alien's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). And the INA defines "admitted," also used in Subsection (a)(2), as "the lawful

entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). An alien may be "admitted" to the United States either at a port of entry or by adjusting his status to that of an LPR while already in the country. See *In re Alyazji*, 25 I. & N. Dec. 397, 399-400 (B.I.A. 2011); *In re Rosas-Ramirez*, 22 I. & N. Dec. 616, 619 (B.I.A. 1999).

The cancellation-of-removal statute further provides that an alien's period of continuous residence is deemed to end

> when the alien is served a notice to appear under section 1229(a) of this title, or * * * when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1).

To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998). The alien bears the burden of proof on those issues. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d). The ultimate discretion of the Attorney General to grant such relief is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted).

2. a. In 1989, at the age of five, respondent Gutierrez, a native and citizen of Mexico, illegally entered the

United States and thereafter resided in the United States with his parents. *Gutierrez* Pet. App. 12a, 18a; *Gutierrez* J.A. 33, 47-48. In 1991, when Gutierrez was seven years old, his father obtained LPR status. *Gutierrez* Pet. App. 12a, 18a; *Gutierrez* J.A. 25, 58. In October 2003, at the age of 19, Gutierrez obtained LPR status. *Gutierrez* Pet. App. 12a-13a; *Gutierrez* J.A. 19, 47.

In December 2005, immigration officials apprehended Gutierrez at the border for alien smuggling and subsequently served and filed a Notice to Appear charging him with being inadmissible on that basis under 8 U.S.C. 1182(a)(6)(E)(i). *Gutierrez* Pet. App. 18a; *Gutierrez* J.A. 59-61. Gutierrez admitted to the facts establishing his removability but sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). *Gutierrez* Pet. App. 13a, 19a; *Gutierrez* J.A. 24-25, 47-56.

In March 2006, after a hearing, an immigration judge (IJ) found Gutierrez statutorily eligible for cancellation of removal, even though he had neither been lawfully admitted for permanent residence for five years (8 U.S.C. 1229b(a)(1)) nor resided in the United States for seven years after a lawful admission (8 U.S.C. 1229b(a)(2)). *Gutierrez* Pet. App. 19a-22a. The IJ first applied *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), to permit Gutierrez to rely on his father's years of lawful residence after his father's admission (attaining LPR status) in 1991 to satisfy Section 1229b(a)(2)'s seven-year continuous-residence requirement. *Gutierrez* Pet. App. 20a-22a. In *Cuevas-Gaspar*, the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for

the purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement. 430 F.3d at 1021-1029.

The IJ next invoked the reasoning of *Cuevas-Gaspar* to permit imputation to Gutierrez of his father's 1991 adjustment to LPR status as well. *Gutierrez* Pet. App. 20a-22a. By virtue of that additional imputation, the IJ found that Gutierrez satisfied Section 1229b(a)(1)'s separate requirement that the alien have been an LPR for at least five years. *Id.* at 22a.[1]

Finally, after weighing Gutierrez's equities, the IJ granted him cancellation of removal in the exercise of discretion. *Gutierrez* Pet. App. 22a-26a.

b. The Board of Immigration Appeals (Board) reversed the IJ's decision and remanded for entry of an order of removal. *Gutierrez* Pet. App. 12a-16a.

The Board declined to extend *Cuevas-Gaspar* to permit the use of imputation to satisfy Section 1229b(a)(1)'s requirement that the alien have been lawfully admitted as a permanent resident for five years. *Gutierrez* Pet. App. 13a-14a. The Board distinguished Section 1229b(a) from the statute at issue in *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (9th Cir. 1994), the case that formed the basis for the Ninth Circuit's holding in *Cuevas-Gaspar*. *Gutierrez* Pet. App. 14a-15a. In *Lepe-Guitron*, the Ninth Circuit had considered the term "domicile" as an eligibility requirement under former 8 U.S.C. 1182(c) (1988) (commonly known by its location in the INA as Section 212(c)).[2] In that case, the Ninth Circuit had held

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[1] It was undisputed that Gutierrez had not been convicted of any aggravated felony, so the IJ also found that he satisfied 8 U.S.C. 1229b(a)(3). *Gutierrez* Pet. App. 20a.

[2] Section 212(c), which was repealed in 1996 and replaced by Section 1229b(a) (see Illegal Immigration Reform and Immigrant Responsi-

that a minor child's "domicile" is that of his parents because domicile requires an intent to remain indefinitely and children are not legally capable of forming the necessary intent. 16 F.3d at 1025. The Board explained in this case that the Ninth Circuit's reasoning in *Lepe-Guitron* does not apply to Section 1229b(a)(1)'s five-year LPR status requirement because the period of five years is measured from when the alien was "admitted" as an LPR, and that "admitted" is a term of art under the INA that "does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." *Gutierrez* Pet. App. 14a. Accordingly, the Board reasoned that, unlike in *Lepe-Guitron*, "it was unnecessary to look to the respondent's parent to determine intent" when evaluating whether he had accrued five years of LPR status. *Id.* at 15a. "Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant." *Ibid.*

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bility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597), provided at the time of *Lepe-Guitron* that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1988). The Board and courts have interpreted that provision to allow for a discretionary waiver for inadmissible or deportable aliens who were permanent residents and who had accrued seven years of "lawful unrelinquished domicile" in the United States. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1023; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (explaining that Section 212(c) was extended to deportable aliens).

Even as to Section 1229b(a)(2), the requirement directly at issue in *Cuevas-Gaspar*, the Board noted that that provision also "contains no domicile requirement," but rather "requires residence, which contains no element of subjective intent." *Gutierrez* Pet. App. 14a-15a. The Board further concluded that to allow imputation of a parent's status and residence to meet both the first and second prongs of Section 1229b(a) "would essentially destroy the distinct tests mandated by Congress." *Id.* at 15a.

c. On remand, the IJ entered a removal order. *Gutierrez* Pet. App. 7a-9a. Gutierrez appealed, and the Board reaffirmed its prior disposition. *Id.* at 5a-6a. The Board cited its then-recent precedential decision in *In re Escobar*, 24 I. & N. Dec. 231 (2007), in which the Board noted its disagreement with *Cuevas-Gaspar* and elaborated on its reasoning for not extending *Cuevas-Gaspar*'s imputation rationale to Section 1229b(a)(1)'s five-year LPR status requirement. *Gutierrez* Pet. App. 5a-6a.

Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board rejected an alien's invocation of imputation in attempting to satisfy Section 1229b(a)(2)'s seven-year continuous-residence requirement. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decisions in *Ramirez-Vargas* and *Escobar* pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See 24 I. & N. Dec. at 600-601.

d. The Ninth Circuit granted Gutierrez's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the

Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). *Gutierrez* Pet. App. 2a. In *Mercado-Zazueta*, the Ninth Circuit rejected the Board's decisions in *Ramirez-Vargas* and *Escobar* and treated *Cuevas-Gaspar*'s holding as binding with respect to the seven-year continuous-residence requirement in Section 1229b(a)(2). See 580 F.3d at 1115. The Ninth Circuit also extended *Cuevas-Gaspar* to Section 1229b(a)(1), holding that "for purposes of satisfying the five years of lawful permanent residence required under [Section 1229b(a)(1)], a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Id.* at 1113.

3. a. In October 1995, at the age of 15, respondent Sawyers, a native and citizen of Jamaica, was admitted to the United States as an LPR. *Sawyers* J.A. 48, 58; *Sawyers* Pet. App. 10a. According to Sawyers, his mother already had been living in the United States as an LPR at the time. *Id.* at 6a. The record does not indicate whether Sawyers had been present in the United States prior to his admission as an LPR in 1995.

On August 9, 2002, Sawyers was convicted of maintaining a dwelling for keeping a controlled substance, in violation of Delaware law. *Sawyers* J.A. 30-44; *Sawyers* Pet. App. 11a. On December 14, 2005, he was convicted of criminal possession of a controlled substance (cocaine), in violation of New York law. *Id.* at10a.

The Department of Homeland Security (DHS) subsequently commenced removal proceedings against Sawyers by filing a Notice to Appear charging (as amended) that he is subject to removal from the United States under 8 U.S.C. 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. *Sawyers* Pet. App. 10a-11a. Before the IJ, Sawyers denied the charge of

removability and, in the alternative, sought relief in the form of cancellation of removal pursuant to 8 U.S.C. 1229b(a). *Id.* at 11a-13a; *Sawyers* J.A. 16-22, 49-55.

In September 2007, after a hearing, the IJ found Sawyers removable as charged and further held that he was ineligible for cancellation of removal. *Sawyers* Pet. App. 9a-14a. As to the latter question, the IJ determined that Sawyers's August 2002 conviction would have made him removable at that time and therefore cut off his period of residence in the United States before he had accrued the seven years of continuous residence required by Section 1229b(a)(2). *Id.* at 13a.[3]

b. The Board agreed that Sawyers was ineligible for cancellation of removal and dismissed his appeal. *Sawyers* Pet. App. 5a-8a. As an initial matter, the Board agreed with the IJ that Sawyers's August 2002 conviction demonstrated his commission of a removable offense (thereby cutting off his own period of continuous residence short of the requisite seven years). *Id.* at 6a.

The Board then noted that the IJ did not address Sawyers's argument that his mother's period of lawful residence should be attributed to him for purposes of meeting Section 1229b(a)(2)'s seven-year continuous-residence requirement. The Board, however, ultimately deemed that omission harmless. *Sawyers* Pet. App. 6a-

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[3] At the time of the hearing, Sawyers had been "an alien lawfully admitted for permanent residence" for more than five years and hence satisfied 8 U.S.C. 1229b(a)(1). See 8 C.F.R. 1.1(p); *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006). In addition, although DHS originally charged Sawyers with being subject to removal for having been convicted of a drug-trafficking aggravated felony, it later withdrew that charge, and the IJ made no determination as to whether any of Sawyers's convictions were aggravated felony offenses. *Sawyers* Pet. App. 10a-11a. Accordingly, the government does not dispute that Sawyers also satisfied 8 U.S.C. 1229b(a)(3) for present purposes.

7a. The Board acknowledged the holding in *Cuevas-Gaspar*, *supra*, that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the purpose of satisfying the seven-year residency requirement in Section 1229b(a)(2). *Sawyers* Pet. App. 6a-7a. But the Board considered itself bound by its more recent decision, *In re Escobar*, *supra*, in which the Board had explained its disagreement with *Cuevas-Gaspar* in declining to extend the imputation rule to Section 1229b(a)(1)'s five-year LPR status requirement. *Sawyers* Pet. App. 7a. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decision in *Escobar* pursuant to *Brand X Internet Services*, *supra*. *Sawyers* Pet. App. 7a.

c. The Ninth Circuit granted Sawyers's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, *supra*, "on an open record for any further determinations that the [Board] deems necessary," including findings "regarding the residency of [Sawyers's] mother and regarding whether [Sawyers] was a minor residing with her." *Sawyers* Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

The Ninth Circuit's rule permitting an alien seeking cancellation of removal to rely on a parent's period of lawful permanent resident status and residence after lawful admission to satisfy the eligibility requirements of 8 U.S.C. 1229b(a)(1) and (2) is contrary to the statute's plain language, its legislative history, and the

Board's authoritative interpretation—all of which require that "the alien" personally satisfy the statute's requirements.

A. The plain language of Section 1229b(a) dictates that the decisionmaker look only to the alien seeking relief, not anyone else, to determine whether "*the* alien" "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) has resided in the United States continuously for 7 years after having been admitted in any status." The phrase "after having been admitted," and the definition of "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer" (8 U.S.C. 1101(a)(13)(A)), specify the alien's own admission rather than the admission of any other individual. The INA's definition of "residence" as a person's "principal, actual dwelling place in fact, without regard to intent" (8 U.S.C. 1101(a)(33)), denotes the alien's own residence and renders parental intent irrelevant with respect to Section 1229b(a)(2)'s continuous-residence requirement. And the phrase "lawfully admitted for permanent residence," defined to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States" (8 U.S.C. 1101(a)(20)), refers to a status personal to the individual alien.

In light of the clear textual mandates of Sections 1229b(a)(1) and (2), the lack of an express bar on imputation is not tantamount to affirmatively authorizing imputation, nor does it leave the issue open to that interpretation. Allowing imputation would also undermine the operation of related INA provisions in a way that Congress could not have intended.

B. Consistent with the statute's plain language, nothing in the legislative history indicates that Congress

intended that an alien be allowed to rely upon another person's status, residency, or admission date to satisfy the requirements of Section 1229b(a). In particular, the suggestion that Congress ratified the Board's interpretation permitting imputation under former Section 212(c) rings hollow given that Section 212(c) turned on the alien's "domicile," whereas Section 1229b(a)(2) turns on the alien's "residence." By changing the operative statutory language from "domicile" to "residence," Congress eliminated the intent-based requirement on which imputation had been predicated under Section 212(c).

The asserted general legislative preference for family unity likewise cannot trump the statute's clear eligibility requirements; rather, the alien's family ties are to be considered in determining whether he should be granted relief as a matter of discretion if he is otherwise eligible. The long waiting period for minor children of LPRs to obtain derivative LPR status under certain circumstances demonstrates that family unity is by no means an unyielding goal of the INA. The Ninth Circuit's reliance on any such general policy preference is particularly inapt here, where respondents (like many other aliens seeking imputation for purposes of cancellation of removal) are not minors but adults who have committed removable offenses.

C. To the extent any ambiguity remains, the Board's precedential interpretations of Sections 1229b(a)(1) and (2) as not permitting imputation are reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The other courts of appeals that have considered the question have correctly rejected the Ninth Circuit's contrary interpretation and granted deference to the Board. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin* v. *Attorney Gen. of the*

U.S., 520 F.3d 264, 269 (3d Cir. 2008); see also *Cervantes* v. *Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).

The Ninth Circuit's reasoning in extending imputation from former Section 212(c) to Section 1229b(a) is erroneous in multiple respects. The Ninth Circuit has ignored the fundamental distinction between "domicile" and "residence"—including the absence of "intent" as a consideration for purposes of determining residence—and thereby has failed to acknowledge that "there is no legal reason for [the Court] to turn to [a child's] parents" under Section 1229b(a)(2). *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1031-1032 (9th Cir. 2005) (Fernandez, J., dissenting). The Ninth Circuit has made the further leap of imputing to a child not only a parent's period of residence after lawful admission but also the parent's status as an LPR—despite the absence of any textual hook whatsoever in Section 1229b(a)(1). Although the Ninth Circuit concluded that the Board's interpretation is not entitled to *Chevron* deference because the Board has been inconsistent, it cited only instances in which the Board has permitted imputation in other contexts under different statutory provisions that implicate an alien's state of mind but not "status" or "residence." See *id.* at 1024-1026. The Board has been consistent in its rejection of imputation of objective legal status and has distinguished those other contexts in its reasoned rejection of the Ninth Circuit's contrary rule under Section 1229b(a). See *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600-601 (2008); *In re Escobar*, 24 I. & N. Dec. 231, 234 n.4 (2007).

ARGUMENT

SECTION 1229b(a) DOES NOT PERMIT IMPUTATION OF A PARENT'S YEARS OF PERMANENT RESIDENT STATUS, OR RESIDENCE AFTER LAWFUL ADMISSION, TO ESTABLISH AN ALIEN'S OWN ELIGIBILITY FOR CANCELLATION OF REMOVAL

Section 1229b(a) requires (in relevant part) that "the alien" seeking cancellation of removal "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. 1229b(a). Based on an interpretation rejected by the Board of Immigration Appeals and by the other courts of appeals that have considered it, the Ninth Circuit permitted respondents to circumvent those requirements by pointing to the years of LPR status and residence after lawful admission in any status accrued by someone else—their parents. Such imputation conflicts with the statute's plain terms, structure, and legislative history—as well as with the Board's correct and reasonable interpretation of Section 1229b(a), which is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Accordingly, the Ninth Circuit's atextual and outlying imputation rule cannot stand.

A. The Plain Text Of Section 1229b(a) Requires That The Alien Personally Satisfy Its Eligibility Requirements

Statutory interpretation "must begin with the plain language of the statute." *Negusie* v. *Holder*, 129 S. Ct. 1159, 1178 (2009). Here, the plain language of 8 U.S.C. 1229b(a) dictates that the decisionmaker look to the status, residency, and admission date of "the alien" himself, not of anyone else, for purposes of establishing eligibil-

ity for cancellation of removal. The Ninth Circuit decisions allowing an alien to rely on a parent's status, residency, and admission date to satisfy the requirements of Sections 1229b(a)(1) and (2) cannot be reconciled with the statutory text.

1. Section 1229b(a)(2) requires that "the alien" have resided in the United States for seven continuous years after "having been admitted" in any status

Section 1229b(a)(2) requires as an element of eligibility for cancellation of an alien's removal that "the alien * * * has resided in the United States continuously for 7 years after having been admitted in any status." That text forecloses the Ninth Circuit's imputation rule.

First, by specifying that "*the* alien" whose removal is at issue must have resided in the United States for seven years after having been admitted, the statute leaves no room to impute to the alien the admission date or residency period of anyone else (including the alien's parent). The use of the definite article before "alien" limits the phrase to "the alien" defined earlier in the sentence—that is, the alien for whom cancellation of removal is being considered. "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (citation omitted); see *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923) ("The use of the definite article [before appraisement] means an appraisement specifically provided for."); see also *American Heritage Dictionary of the English Language* 1792 (4th ed. 2006) (defining "the" as "[u]sed before singular or plural nouns and

noun phrases that denote particular, specified persons or things"). The Ninth Circuit's decisions permitting the alien seeking cancellation relief to rely on the admission and residence of someone else disregard this basic textual point.

Second, and relatedly, the phrase "after having been admitted" reinforces the conclusion that Section 1229b(a)(2) refers to the alien's own admission rather than the admission of any other individual. That reading is supported by the INA's definition of the terms "admission" and "admitted," which is, "with respect to an alien, the lawful entry of *the* alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (emphasis added); see p. 4, *supra*. In other words, an alien's status as "admitted" is to be determined solely by reference to the alien's *own* lawful entry after official inspection and authorization. The admission of anyone else, including the alien's parent, is irrelevant. The Ninth Circuit's departure from that requirement is especially stark, given that Gutierrez did not attain any lawful status at all (let alone admission) until he was granted LPR status at the age of 19—just two years before committing a removable offense and being placed into removal proceedings. To nevertheless permit imputation in such circumstances would effectively redact the words "of the alien" from the definition of "admission" in 8 U.S.C. 1101(a)(13)(A). Cf. *In re Reza-Murillo*, 25 I. & N. Dec. 296, 299 (B.I.A. 2010).

Third, the INA provides that "[t]he term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). That definition's use of the possessive pro-

noun "his" evinces that the term "residence"—and hence the term "resided" in Section 1229b(a)(2)—denotes the alien's own residence, and not the residence of anyone else. Moreover, the definition's reference to the "principal, actual dwelling place in fact, without regard to intent," expressly precludes any reliance on intent—which, by contrast, is relevant to determining an alien's domicile (see pp. 28-29, 36-37, *infra*). For that reason, regardless of whether a minor alien is capable of forming a legally sufficient intent to establish *domicile*, there is no basis to consider intent (and thus to impute a parent's intent) with respect to the minor's actual *residence*. Accordingly, the use of the term "resided" in Section 1229b(a)(2) confirms the conclusion that only the actions, status, and physical location of the alien himself have relevance in establishing statutory eligibility for cancellation of removal.

2. Section 1229b(a)(1) requires that "the alien" seeking cancellation of removal have been "lawfully admitted for permanent residence" for five years

Section 1229b(a)(1), the other eligibility requirement at issue in this case, requires that "the alien * * * has been an alien lawfully admitted for permanent residence for not less than 5 years." By referring to the lawful permanent residence of "*the* alien" subject to removal, Section 1229b(a)(1), like Section 1229b(a)(2), makes clear that the alien seeking cancellation must *personally* satisfy the specified requirement. See pp. 16-17, *supra*.

Moreover, the phrase "lawfully admitted for permanent residence" is defined by the INA to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such

status not having changed." 8 U.S.C. 1101(a)(20). "[S]tatus," in turn, is an attribute personal to the individual alien. See *In re Blancas-Lara*, 23 I. & N. Dec. 458, 460 (B.I.A. 2002) ("[S]tatus" "is generally defined in the legal context as a '[s]tanding; state or condition,' and as '[t]he legal relation of [an] individual to [the] rest of the community'"; it "denotes someone who possesses a certain legal standing.") (quoting *Black's Law Dictionary* 1264 (5th ed. 1979)). Section 1229b(a)(1)'s reference to "lawfully admitted for permanent residence" thus reinforces the conclusion that eligibility for cancellation turns on whether and when the government has affirmatively accorded the alien himself the privilege of residing permanently in the United States as an immigrant. The actions and status of others, including the alien's parents, are irrelevant for those purposes.

By contrast, there is no plausible reading of Section 1229b(a)(1)'s text that supports the Ninth Circuit's conclusion that the requirement that "the alien" have been lawfully admitted for permanent residence for five years can be satisfied by the fact that the alien's *parent* had been lawfully admitted for permanent residence for five years. Indeed, under the Ninth Circuit's reading, even an alien who has never been granted LPR status at all might be eligible for cancellation of removal based on a parent's LPR status—contradicting the very title of 8 U.S.C. 1229b(a) ("Cancellation of removal for certain permanent residents"). Cf. *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1110 n.9 (2009)(reserving question). The fact that that is a possible outcome under the Ninth Circuit's interpretation of Section 1229b(a) demonstrates its disconnect with the statute's text.

3. Section 1229b(a)'s lack of an explicit bar to imputation does not suggest that imputation is permissible

As explained above, the plain terms of Sections 1229b(a)(1) and (2) leave no room for imputing somebody else's status, residence, or admission date to establish an alien's eligibility for cancellation relief. See *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1032 (9th Cir. 2005) (Fernandez, J., dissenting) (finding that Section 1229b(a) clearly forecloses imputation). It is therefore not surprising that Section 1229b(a) does not expressly prohibit imputation. Contrary to the Ninth Circuit's conclusion (*id.* at 1022; see also *Sawyers* Br. in Opp. 12-13), the lack of an express bar cannot be read as affirmatively authorizing imputation.

Section 1229(a) is not rendered "silent" simply because it does not explicitly address imputation. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see also, *e.g.*, *Pruidze* v. *Holder*, 632 F.3d 234, 240 (6th Cir. 2011) (explaining that statutory silence does not always indicate a "gap to fill"); *Lin-Zheng* v. *Attorney Gen. of the U.S.*, 557 F.3d 147, 156 (3d Cir. 2009) (en banc) ("[A] statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.") (citation omitted; brackets in original). If a statute were required to refute every possible alternative, nearly every statute would be silent or ambiguous as to far-fetched alternatives. Cf. *Cuomo* v. *Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009); see *Prestol Espinal* v. *Attorney Gen. of the U.S.*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting approach that "manufactures an ambiguity from Congress' failure to specifically foreclose each exception

that could possibly be conjured or imagined," because that "would create an 'ambiguity' in almost all statutes"). Indeed, in denying the availability of imputation under another immigration provision providing similar cancellation-of-removal relief, the Ninth Circuit itself has recognized that "while the text of [the statute] does not explicitly prohibit imputation, neither is it ambiguous." *Barrios* v. *Holder*, 581 F.3d 849, 865 (2009).[4]

4. The structure of the statutory scheme is inconsistent with imputation

The structure of the statutory scheme at issue reinforces the conclusion that Congress left no room for imputation. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (citations omitted). That Congress specified separate sub-

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[4] In analogous circumstances, aliens seeking temporary protected status under the INA have contended that their parents' residency could satisfy 8 U.S.C. 1254a(c)(1)(A)(ii)'s continuous-residence requirement. See *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010). Although they argued that the statute is ambiguous because it "does not explicitly permit or disallow [imputation]," the Third Circuit rejected that argument and held that Section 1254a(c)(1)(A)(ii) is not "'ambiguous' merely because it does not expressly forbid every possible mechanism for functional—but not actual—satisfaction of statutory requirements. Else, near every statute would be 'ambiguous' and courts would have unfettered freedom to fashion creative mechanisms for satisfying the otherwise clear requirements mandated by Congress." *Ibid.*; see *Cervantes* v. *Holder*, 597 F.3d 229, 238 (4th Cir. 2010) (Traxler, C.J., concurring) (finding "no ambiguity to be explained or gap to be filled in [Section] 1254a(c)(1)(A)(ii)" with respect to the impermissibility of imputation).

sections within Section 1229b(a) with distinct requirements reflects Congress's insistence that the alien seeking cancellation of removal meet precise standards, and not be allowed to qualify through a form of substantial compliance or by resort to equitable theories. Notably, Congress has demonstrated elsewhere in the INA that it knows how to automatically accord an immigration status or benefit to an alien child when the parent is accorded a certain status or benefit. See, *e.g.*, 8 U.S.C. 1158(b)(3)(A) (2006 & Supp. III 2009) (granting same status as parent to certain children of aliens granted asylum); 8 U.S.C. 1431 (automatic acquisition of United States citizenship for minor child upon naturalization of parent in certain circumstances); see also *Gutierrez* Br. in Opp. 20-21. But it has not done so here.

Applying Section 1229b(a) according to its plain terms also best harmonizes with other relevant sections of the INA. For example, 8 U.S.C. 1229b(d)(1) provides that an alien's period of continuous residence after admission stops accruing for purposes of cancellation relief when that alien has committed a crime that renders him inadmissible. Imputing a parent's earlier admission and residence, as the Ninth Circuit has done, could allow an alien to circumvent that limitation and thereby nullify the operation of Section 1229b(d)(1) in certain cases—a result that Congress would not have intended. Additionally, 8 U.S.C. 1227(a)(2)(A)(i)(I) renders deportable an alien convicted of a crime involving moral turpitude committed within five years of admission. Under the Ninth Circuit's imputation rules, however, such an alien might be able to impute a parent's prior admission date to become eligible for cancellation of removal under Section 1229b(a). In that scenario, the same alien could be considered to have two different dates for which he was

lawfully admitted for permanent residence in the same removal proceeding—his own LPR admission date, which determines his removability, and another person's imputed LPR admission date, which would determine his eligibility for cancellation relief. Congress presumably would not have intended that result either.[5]

B. The Legislative History And Statutory Context Do Not Reveal Any Congressional Intent To Permit Imputation Under Section 1229b(a)

Because Section 1229b(a)'s language leaves no room for the Ninth Circuit's imputation rule, its reliance on the legislative history and legal context underlying the enactment of Section 1229b(a) (*Cuevas-Gaspar*, 430 F.3d at 1026-1029; see also *Gutierrez* Br. in. Opp. 13-17; *Sawyers* Br. in Opp. 14-16) is misplaced. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011) ("In interpreting a statute, [the Court's] inquiry must cease if the statutory language is unambiguous.") (citations and internal quotation marks omitted). Not surprisingly, there is no indication that Congress intended—contrary to Section 1229b(a)'s plain text—to allow an alien to impute another person's status, residency, or admission date to satisfy the eligibility requirements for cancellation relief.

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[5] Although having more than one admission date is not itself impossible or inconsistent with the INA, see *In re Alyazji*, 25 I. & N. Dec. 397, 400 (B.I.A. 2011) ("some aliens are admitted to the United States more than once during their lives"), it would be incongruous to use different admission dates in the manner suggested above—especially where the earlier admission date is imputed from somebody else and results in different admission dates for the same immigration status (*e.g.*, LPR).

1. The legislative history furnishes no support for imputation under Section 1229b(a)

Section 1229b(a) was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597, to replace the waiver of exclusion (and deportation) previously available under former Section 212(c). See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (Section 1229b(a) "is intended to replace and modify the form of relief now granted under section 212(c) of the INA."); H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. I, at 232 (1996) (same); see also *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001) (explaining that IIRIRA repealed Section 212(c) and replaced it with 8 U.S.C. 1229b(a)).

The limited legislative history that exists, viewed against the backdrop of the existing legal landscape, indicates that Congress focused on three main goals in circumscribing eligibility for the newly created cancellation-of-removal relief: (1) restricting relief from removal for aliens convicted of certain crimes;[6] (2) creating a "stop-time" rule that would stop the running of an alien's period of residence at a defined point;[7] and (3)

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[6] As the Court explained in *St. Cyr*, Section 1229b "gives the Attorney General the authority to cancel removal for a narrow class of * * * aliens[.] So narrowed, that class does not include anyone previously 'convicted of any aggravated felony.'" 533 U.S. at 297 (quoting 8 U.S.C. 1229b(a)(3) (1994 & Supp. V 1999)).

[7] The stop-time rule was motivated by the concern that aliens had been delaying their immigration proceedings in order to continue to accrue time towards eligibility. See H.R. Rep. No. 879, 104th Cong., 2d Sess. 108 (1997) ("The reforms ended the accrual of time-in-residence on the date an alien is placed into removal proceedings, thus removing the incentive for aliens to prolong their cases in the hope of

clarifying the operation of the durational requirements for legal status and physical presence that had existed under Section 212(c). As explained below, the third issue culminated in the requirements at issue in this case.

In pertinent part, Congress enacted Section 1229b(a) to revise the physical presence and status requirements for relief from removal—with no suggestion that an alien could rely on imputation to satisfy them. See *Mercado-Zazueta*, 580 F.3d at 1110 (stating that the statute was crafted "to resolve a circuit split that did not concern imputation"). As noted above (note 2, *supra*), a waiver under former Section 212(c) was available to LPR aliens who could show seven consecutive years of "lawful unrelinquished domicile" in the United States. The courts of appeals had disagreed as to whether those seven years must follow the granting of LPR status to the alien or whether the alien could count years of domicile in the United States under some other lawful status preceding his adjustment to LPR status. See *Cuevas-Gaspar*, 430 F.3d at 1027-1028 (collecting cases).

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remaining in the U.S. long enough to be eligible for relief.") (describing H.R. 1915, one of IIRIRA's predecessors); see also *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS) ("Currently, that 7 years is permitted to run for as long as they're here. We will be proposing legislation that will stop the running of the clock at the beginning of the immigration proceeding when the order to show cause is issued. We think that will then stop needless delay, people filing additional motions to accumulate the 7 years."). The stop-time rule enacted in Section 1229b(d)(1) ensured that the eligibility period ended, at the very latest, at the time immigration proceedings were initiated. As explained above (p. 22, *supra*), however, the Ninth Circuit's imputation rule could undermine its operation in certain circumstances.

In response, Section 1229b(a) created two new and distinct durational requirements. Congress made clear that the first—the five-year LPR status requirement—must be satisfied by years after the alien obtains LPR status, while the second—the seven-year continuous-residence (replacing "unrelinquished domicile") requirement—could be satisfied by years residing in the United States before the alien obtained LPR status (as long as those years were subsequent to the alien's admission under some lawful status). See 8 U.S.C. 1229b(a)(1) and (2). Congress designed those dual requirements, along with the stop-time rule, to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082, S6104 (daily ed. May 3, 1995) (Department of Justice explanation of S. 754, Immigration Enforcement Improvements Act of 1995, a precursor to IIRIRA); see also *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS) (same).

At no point in Congress's consideration of Section 1229b was there any indication that it considered the possibility, let alone intended, that the period of LPR status or residence after lawful admission of anyone other than the alien seeking cancellation of removal—such as the alien's parent—would satisfy the new statutory requirements. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009) (finding an "absence of support in the statutory language or legislative history" for the proposition that a parent's residence "was intended to be counted towards the requirements of section 1229b(a)");

Augustin v. *Attorney Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008) ("[W]e have been unable to find in IIRIRA's legislative history any indication of Congress's intention regarding imputation."). Nor is there any evidence that Congress approved or intended to adopt the preexisting interpretation permitting imputation with respect to the "domicile" requirement under former Section 212(c). To the contrary, it appears that Congress feared that the carefully prescribed limits on Section 1229b(a) relief would not be respected. See *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 2d Sess. 3 (1996) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Immigration & Claims) ("[T]here is legitimate concern that even a narrowly tailored form of relief would soon be broadened to include a wide range of cases never intended by Congress.").

There is no merit to respondents' argument that it was "settled" (*Sawyers* Br. in Opp. 16) that the previous domicile-based eligibility requirement in former Section 212(c) permitted imputation, and that Congress therefore automatically "authorized the imputation rule" (*id.* at 17; see *Gutierrez* Br. in Opp. 15) when enacting Section 1229b without any mention of imputation. As an initial matter, there is no indication that the imputation issue was ever called to the attention of Congress. See *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) ("[C]ongressional silence lacks persuasive significance.") (internal quotation marks and citation omitted); see also *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

More importantly, the doctrine of congressional ratification does not apply where, as here, "Congress did not simply reenact [the statute] without change." *Jama*

v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005). In this instance, Congress enacted a new statute, with meaningfully different operative language. In particular, Congress replaced the "domicile" requirement in Section 212(c) with a "reside[nce]" requirement in Section 1229b(a)(2). The latter differs fundamentally from the former: domicile turns on intent, whereas residence does not. Compare *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) (adopting common-law definition of "domicile" that "aliens must not only be physically present here, but must intend to remain") (citation omitted), with 8 U.S.C. 1101(a)(33) (defining "residence" to be "without regard to intent");[8] see also pp. 36-37, *infra*. And, with respect to Section 1229b(a)(1)'s separate five-year LPR status requirement, there is neither a domicile nor a residence requirement—leaving no textual hook whatsoever for imputation.

As Gutierrez acknowledges, the prior authority permitting imputation under Section 212(c) reasoned that "because most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Gutierrez* Br. in Opp. 13-14 (internal quotation marks and citations omitted). There is no similar intent-based requirement in Section 1229b(a) to support the use of imputation for cancellation of removal. See *In re Escobar*, 24 I. & N. Dec. 231, 233 (B.I.A. 2007) ("[R]esidence is different from domicile because it 'contains no element of subjective intent.' Accordingly, we conclude that there is no logical or legal basis to consider the residence of a minor alien's parents in determining whether the minor ac-

[8] The definition of "residence" in 8 U.S.C. 1101(a)(33) long predated IIRIRA, see Immigration and Nationality Act, ch. 477, § 101(a)(33), 66 Stat. 170, whereas "domicile" was never defined in the Act.

quired the necessary years of residence" under Section 1229b(a).) (quoting *Cuevas-Gaspar*, 430 F.3d at 1031 (Fernandez, J., dissenting)); see also *Augustin*, 520 F.3d at 270-271 (similar); *Deus*, 591 F.3d at 810-811 (similar). Whether "Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation" (*Sawyers* Br. in Opp. 17 (citation omitted)) or for some other purpose (*Gutierrez* Br. in Opp. 14-15) is beside the point; the pertinent fact is that there is no longer any intent-based requirement on which imputation (or ratification thereof) could be predicated.

2. The general preference for family unity does not trump the statute's text

Lacking any direct evidence of congressional intent, the Ninth Circuit premised its imputation rule on what it perceived to be the "high priority" accorded by the immigration laws to keeping LPR parents and their minor children together. *Cuevas-Gaspar*, 430 F.3d at 1024 (quoting *Lepe-Guitron*, 16 F.3d at 1025); see *Mercado-Zazueta*, 580 F.3d at 1105-1106; see also *Gutierrez* Br. in Opp. 20-22; *Sawyers* Br. in Opp. 21-22. But there is no reason to believe that Congress intended that general policy to trump Section 1229b(a)'s explicit requirement that the alien himself meet certain minimum criteria to qualify for cancellation of removal. Rather, the existence of family ties in the United States is a positive factor to be considered in determining whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discretion. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

In any event, in cases in which aliens would rely upon their parents' status or residence to satisfy the eligibility criteria of Sections 1229b(a)(1) and (2), the aliens

applying for relief typically are *not* unemancipated minors seeking to reunite or remain with their parents in the United States. Instead, they are adults seeking to avoid removal after committing removable offenses. Respondent Gutierrez, for example, was not granted LPR status in his own right until October 2003, at the age of 19, and he did not seek to benefit from imputation of his father's LPR status and residence until after he was apprehended and placed in removal proceedings for alien smuggling in December 2005, at the age of 22. *Gutierrez* Pet. App. 12a-13a. Respondent Sawyers also did not seek to benefit from imputation until after he was placed in removal proceedings for his drug convictions, when he was 26 years old. *Sawyers* Pet. App. 10a-11a; *Sawyers* J.A. 56-57.

Moreover, any immigration-law preference for family unity is not absolute. Although many immigration programs permit an alien's spouse and minor children to apply for admission at the same time the principal alien obtains admission as an LPR, not all do. The legalization program under the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, for example, does not provide for derivative legal status for immediate family members. See 8 U.S.C. 1255a (2006 & Supp. III 2009) (providing for adjustment of status for only those aliens individually meeting the requirements); *Family Unification, Employer Sanctions & Anti-Discrimination Under IRCA: Hearing Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 100th Cong., 2d Sess. 34 (1988) ("Congress didn't order derivative legalization" under IRCA) (statement of Rep. Romano L. Mazzoli); *id.* at 147-148 ("Congress clearly said no derivative legalization—we had an opportunity to say it, and

we intentionally did not make every member of the family automatically part of the one successful application."); *Applicant Processing for Family Unity Benefits*, 56 Fed. Reg. 42,948 (Aug. 30, 1991) (Under IRCA, "no provisions [were] made for any derivative immigration status for their spouses or children.").

Aliens who obtain LPR status through IRCA, and others who for whatever reason did not or could not apply for their immediate family members along with their own application, may independently seek a visa for their immediate family members under 8 U.S.C. 1151-1153 (2006 & Supp. III 2009). The number of visas allocated to spouses and minor children of LPRs is subject to annual numerical limits set by Congress (8 U.S.C. 1153(a)(2)), however, and because demand for those visas has exceeded the available number, a large backlog has existed for visas in that category for decades. Accordingly, many immediate family members of LPRs must wait years to immigrate to the United States.[9] For example, when Gutierrez was granted LPR status in October 2003, children of LPRs emigrating from Mexico had been waiting over seven years (11 years if over the age of 21) for a visa. See U.S. Dep't of State, *Visa Bulle-*

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[9] Some immediate relatives of IRCA beneficiaries were granted a limited form of relief from removal under the Family Unity Program. See Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 5029, located as amended at 8 U.S.C. 1255a note 3. But that relief was available only to immediate relatives who entered the United States prior to certain specified dates in 1988. *Ibid.*; see *In re Reza-Murillo*, 25 I. & N. Dec. at 297 n.1 (describing program); see also 8 U.S.C. 1101(a)(15)(V).

tin for October 2003, http://www.travel.state.gov/visa/bulletin/bulletin_2985.html.[10]

Although well aware of this backlog and the long waiting times that result, Congress for the most part has not acted to eliminate them.[11] Congress's failure to respond indicates that the "preference" for family members of LPRs is just that—a preference—and not an absolute mandate that trumps all other immigration policy goals or statutory requirements. Congress thus has not categorically placed a preference for unifying minor (let alone adult) children with their LPR parents in the United States above all other requirements of the immigration laws. The Ninth Circuit's rule that aliens may rely on their parents' LPR status and residence to obtain cancellation relief under Section 1229b(a) essentially allows aliens an end-run around specific statutory limitations on obtaining lawful status; indeed, the Ninth Circuit's rule would impute a parent's adjustment to LPR status even if the alien had not or could not have

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[10] For that reason, the delay alien children experience in obtaining LPR status may be attributable in certain cases to the waiting time for immigrant visas and not to any decision on the part of the alien's parents. Contrary to Sawyers's suggestion (*Sawyers* Br. in Opp. 20-21), however, the Ninth Circuit's imputation rule does not require a court to examine the reasons why an alien did not obtain LPR status when his parent obtained that status. Nor does the statute provide any basis for such an inquiry. Cf. *Mercado-Zazueta*, 580 F.3d at 1115-1116 (Graber, J., concurring).

[11] The visa backlog was the subject of much discussion in Congress prior to the passage of IIRIRA. See H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. I, at 134 (1996) ("[T]here is a backlog of 1.1 million spouses and minor children of lawful permanent residents waiting for admission or for legal status."). Congress, however, rejected proposals to eliminate or reduce the backlog. See *id.* at 84; H.R. Rep. No. 879, 104th Cong., 2d Sess. 121 (1997).

satisfied the procedural and substantive eligibility requirements for LPR status at that earlier time. See *Escobar*, 24 I. & N. Dec. at 234 (reasoning that imputation under Section 1229b(a)(1) disregards "the mandated statutory and regulatory application process and the substantive eligibility requirements for admission"). Relatedly, such imputation bypasses limitations placed on the availability of cancellation-of-removal relief in Section 1229b(a), and thereby upsets Congress's carefully crafted balance among competing policy concerns.

C. The Board's Reasonable Interpretation Of Section 1229b(a) Is Entitled To *Chevron* Deference

Given that the plain meaning of Section 1229b(a) forecloses imputation of another alien's status, period of residency, or date of admission, the questions presented can be resolved at step one of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843 (calling for further inquiry only if "the statute is silent or ambiguous with respect to the specific issue"). But even if the statute were deemed ambiguous, the Board's precedential interpretation that imputation is impermissible—see *Escobar*, 24 I. & N. Dec. at 233-235 (Section 1229b(a)(1)); *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008) (Section 1229b(a)(2))—is at least reasonable and thus entitled to controlling deference at step two of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843-844; see also *Negusie*, 129 S. Ct. at 1163-1164 (according *Chevron* deference to Board's interpretation of INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same).

1. The standard for what constitutes an agency's reasonable interpretation for *Chevron* purposes is broad, 467 U.S. at 843, and courts ordinarily defer to the Board's interpretation of the INA unless the interpreta-

tion is "clearly contrary to the plain and sensible meaning of the statute." *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted); see *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 712 (2011) ("The sole question for the Court at step two under the *Chevron* analysis is 'whether the agency's answer is based on a permissible construction of the statute.'") (quoting *Chevron*, 467 U.S. at 843). As other courts of appeals have concluded with respect to Section 1229b(a)(2), the Board's "straightforward" refusal here "to read into the statute an [imputation] exception seemingly at odds with the statute's requirements" is at the very least reasonable. *Augustin*, 520 F.3d at 270-271 (holding that the Board's "refusal to create an exception simply heeds the statute's plain requirements"); see *Deus*, 591 F.3d at 811 (deeming "the [Board]'s interpretation * * * not inconsistent with the statute and therefore permissible under *Chevron*'s deferential review"); see also *Cuevas-Gaspar*, 430 F.3d at 1032 (Fernandez, J., dissenting). That should be the end of the inquiry under *Chevron*.

The Ninth Circuit has not held that the Board's interpretation rejecting imputation is foreclosed by the terms of the statute; nevertheless, it has determined that the Board's interpretation is unreasonable. See *Mercado-Zazueta*, 580 F.3d at 1112-1115; *Cuevas-Gaspar*, 430 F.3d at 1024-1029. But Section 1229b(a)'s text and legislative history provide more than ample support for the Board's interpretation. As discussed above (pp. 15-20, 23-29, *supra*), the plain language of Section 1229b(a) dictates that the decisionmaker look only to the status, residency, and admission of "the alien" who is seeking cancellation of removal for purposes of establishing the alien's eligibility for that relief,

and the legislative history lacks any basis for a contrary reading.

2. By contrast, the Ninth Circuit's reasoning—based on its precedent that originated in the different wording of former Section 212(c), and on its policy determinations—fails on its own terms. The Ninth Circuit's imputation rule traces back to *Lepe-Guitron*, *supra*, in which it held that a parent's domicile could be imputed to an unemancipated minor child for purposes of the "domicile" requirement under former Section 212(c). In that case, the Ninth Circuit relied on the fact that the common-law definition of "domicile" incorporates notions of intent, *i.e.*, not only physical presence but an intent to remain indefinitely in the United States. *Lepe-Guitron*, 16 F.3d at 1025. The Ninth Circuit reasoned that because "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place," "a child's domicile follows that of his or her parents." *Ibid.* (citations omitted); see Restatement (Second) of Conflict of Laws § 22(1), at 88 (1971) (providing that generally "[a] minor has the same domicil as the parent with whom he lives").

In *Cuevas-Gaspar*, the Ninth Circuit extended the reasoning of *Lepe-Guitron* to Section 1229b(a)(2) by effectively equating "domicile" with "residence"—the specified metric for Section 1229b(a)(2)'s seven-year requirement. 430 F.3d at 1026. Over a dissent, the panel majority in *Cuevas-Gaspar* rejected the distinction between residence and domicile, stating summarily that the distinction "is not * * * so great as to be dispositive." *Ibid.* The *Cuevas-Gaspar* majority then took a further leap by reasoning that because *Lepe-Guitron* held "that a parent's 'lawful unrelinquished domicile' is imputed to the parent's minor children," it must have

"necessarily held that the parent's *admission* for permanent residence was also imputed to the parent's minor children." *Ibid.* On that basis, it proceeded broadly to permit the alien child to rely on a parent's "admission" for purposes of satisfying the requirement of Section 1229b(a)(2). *Ibid.*

The Ninth Circuit's extension of *Lepe-Guitron* in *Cuevas-Gaspar* is erroneous in at least two critical respects. First, it ignores the distinction between "domicile" and "residence." The INA expressly provides that "residence" is to be evaluated "without regard to intent," 8 U.S.C. 1101(a)(33)—a key consideration in determining domicile. See pp. 28-29, *supra*. Courts consistently have recognized that the element of intent distinguishes the two concepts in the immigration context. See, *e.g.*, *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010) (distinguishing "residence from domicile, because under the INA, residence is defined as an alien's 'principal, actual dwelling place in fact, *without regard to intent*'") (quoting 8 U.S.C. 1101(a)(33); citing *Augustin*, 520 F.3d at 270-272); *Cervantes* v. *Holder*, 597 F.3d 229, 237 (4th Cir. 2010) ("[T]here is a crucial distinction between a 'domicile' and a 'residence.'"); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (noting that although "[a] minor's domicile is the same as that of its parents," residence is "determined from the physical fact of * * * living in a particular place"); *Chan Wing Cheung* v. *Hamilton*, 298 F.2d 459, 461 (1st Cir. 1962) ("'Residence' within the [INA] is not the equivalent of domicile.").[12]

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[12] Even the Ninth Circuit elsewhere has recognized and given effect to the intent-based distinction between "domicile" and "residence" under the immigration laws. *Kyung Park* v. *Holder*, 572 F.3d 619, 623-624 (2009) (comparing 8 C.F.R. 213a.1 with 8 U.S.C. 1101(a)(33)); see

The Ninth Circuit failed to provide any sound basis to transpose the common-law understanding of "domicile," which incorporates intent, onto the statutorily defined term "residence." Crucially, once "intent" is removed from the analysis, "there is no legal reason for [the Court] to turn to [a child's] parents." *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting); see *Cervantes*, 597 F.3d at 237 (stating that children "can have their own residences, separate and apart from that of their parents"); *Deus*, 591 F.3d at 811 (holding that "the relevant inquiry under [Section] 1229b(a), residence, presents no question regarding a minor's intention").

Second, the Ninth Circuit in *Lepe-Guitron* discussed the imputation of "domicile" alone and confined its holding to the limited principle "that a child's domicile follows that of his or her parents." 16 F.3d at 1025. *Lepe-Guitron* did not hold that a parent's lawful admission may be imputed to the child; indeed, there was no occasion to do so in that case. The court in *Lepe-Guitron* emphasized that the alien child himself had entered the United States legally with his parents and "was always legally within the country [and] was domiciled here." *Id.* at 1024. The alien child also had become an LPR as a minor, albeit only for three years before he was convicted and invoked Section 212(c) relief. *Id.* at 1022-1023. Because the court in *Lepe-Guitron* rejected an interpretation that would require a minor child's (as opposed to an adult's) "'lawful unrelinquished domicile' to begin on the day he or she acquires permanent residence," there was no need to impute the parent's LPR

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8 C.F.R. 213a.1 ("*Domicile* means the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of the Act, with the intention to maintain that residence for the foreseeable future.").

status to the alien child. *Id.* at 1025; see *id.* at 1026 n.12 (stating that only adults must be lawful permanent residents to accrue domicile status). The Ninth Circuit's reliance in *Cuevas-Gaspar* on *Lepe-Guitron* as supporting imputation of lawful admission (in addition to residency) thus has no basis in *Lepe-Guitron*. And *Mercado-Zazueta*'s extension of *Cuevas-Gaspar* as requiring imputation of a parent's LPR status to the alien seeking relief under Section 1229b(a)(1) (580 F.3d at 1113) is doubly mistaken for that reason.

3. Although the Ninth Circuit identified "other contexts" in which the Board has permitted imputation, those contexts are easily distinguishable and thus create no "inconsistency" diminishing the deference owed to the Board's interpretation of Section 1229b(a). *Mercado-Zazueta*, 580 F.3d at 1111-1112; see *Cuevas-Gaspar*, 430 F.3d at 1024-1026. Most fundamentally, those different contexts—involving issues of abandonment, firm resettlement, and knowledge of admissibility, see *ibid.*—implicate state of mind, not objective conditions such as "status" or "residence."

It is true, for example, that the Board has imputed to an alien child (to the child's detriment) a parent's abandonment of LPR status; but abandonment clearly incorporates consideration of the alien's intent. See, *e.g.*, *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988) (stating that "the immigration judge was incorrect in concluding that the applicant's intent was irrelevant in determining whether she [as well as her children] had abandoned that status"); see also *Augustin*, 520 F.3d at 271 (finding that such cases "are not in direct conflict with the BIA's interpretation of the cancellation statute because the determination in these cases turned in part on the minor alien's intention"); *Escobar*, 24 I. & N. Dec. at 234 n.4

("The imputation of a decision to abandon permanent resident status from a parent to a child is consistent with the above-mentioned longstanding policy that a child cannot form the intent necessary to establish his or her own domicile."). The other situations are similarly distinguishable. See, *e.g.*, *Vang* v. *INS*, 146 F.3d 1114, 1116-1117 (9th Cir. 1998) (likening firm resettlement in a third country to domicile for purposes of the bar to asylum); *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (attributing parents' knowledge of misrepresentation in entering the United States to the children).

By contrast, the criteria at issue here—"residence," "admission," and LPR "status"—depend solely on objective conduct by the alien personally or some official action by the government, with respect to the alien, without regard to mental state. The Board has been consistent in its rejection of imputation of objective legal status under Section 1229b(a) and has explained its reasoned (and wholly reasonable) rejection of the Ninth Circuit's contrary rule—largely for the reasons set forth in this brief. See *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601; *Escobar*, 24 I. & N. Dec. at 233-235. Accordingly, to the extent the Court finds any ambiguity in the statutory language, the Board's interpretation is entitled to deference.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

* * * * *

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United

States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

* * * * *

RECORD AND BRIEFS

No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,

v.

DAMIEN ANTONIO SAWYERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a parent's years of residence after lawful admission to the United States may be imputed to an unemancipated minor child for purposes of satisfying the requirement of 8 U.S.C. § 1229b(a)(2) that aliens seeking discretionary cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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BRIEF FOR RESPONDENT

STATEMENT

To be eligible for relief from removal under 8 U.S.C. § 1229b(a)(2), respondent Damien Antonio Sawyers must establish that he has "resided in the United States continuously" for seven years. Respondent's mother, now a U.S. citizen, did reside continuously in this country for more than seven years while respondent was a minor child, and he lived with her for at least a portion of that period. The question here is whether the years of continuous U.S. residence accumulated by respondent's mother may be imputed to him for purposes of satisfying the "resided continuously" requirement of Section 1229b-(a)(2).

In its answer to this question, the government's brief reveals significant areas of common ground between the parties. The government evidently recognizes that the courts uniformly had permitted parent-to-child imputation under Section 1229b(a)(2)'s predecessor provision, Section 212(c) of the Immigration and Nationality Act of 1952 (INA), Pub. L. 82-414, 66 Stat. 163. See U.S. Br. 27. It acknowledges that Congress changed the language of this relief-from-removal provision when it enacted Section 1229b(a)(2) for reasons that had nothing to do with imputation, and does not suggest any reason why Congress would have *wanted* to preclude imputation when it made this change. It also recognizes that precluding imputation leads to an outcome that is in some tension with Congress's goal of encouraging family unification. See U.S. Br. 25-26, 29-30. But the government nevertheless insists that when Congress replaced the "unrelinquished domicile" requirement

of Section 212(c) with Section 1229b(a)(2), it left "no textual hook whatever for imputation." U.S. Br. 28.

That conclusion, however, is wrong. Courts permitted imputation of "unrelinquished domicile" from parent to child under Section 212(c) in part because domicile has an intent component and it is appropriate to impute a parent's intent to a minor child. But in this respect, the language of Section 1229b(a)(2) is identical to that of Section 212(c); in the immigration context, the term "resided continuously" (or "continuously resided") *also* always has been understood to look to intent. Moreover, courts applying Section 212(c) necessarily imputed residence from parent to child because residence is an essential element of domicile. Congress accordingly would have known that the language of Section 1229b(a)(2) did not depart from that of its predecessor in any material way—and that this language continued to permit imputation.

A. Statutory Background

1. The current cancellation-of-removal provision codified at 8 U.S.C. § 1229b is rooted in a long history of earlier immigration provisions. Section 3 of the Immigration Act of 1917 excluded from admission to the United States several classes of aliens, such as those that had committed crimes of moral turpitude. Immigration Act of 1917, Pub. L. 64-301, 39 Stat. 875-876. The Seventh Proviso in Section 3 of the Act contained an early version of a waiver of excludability. *Id.* at 878. In 1952, when Congress enacted the current INA, it included a waiver of excludability in

the former Section 212(c) of the Act. 8 U.S.C. § 1182(c) (1994).[1] Prior to 1996, this section provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)).

8 U.S.C. § 1182(c) (1994); *Judulang* v. *Holder*, No. 10-694, slip op. 2-3 (U.S. Dec. 12, 2011) (describing Section 212(c)).[2] In the years prior to 1996, the agency awarded relief under former Section 212(c) in approximately half of all cases in which it was sought. See *INS* v. *St. Cyr*, 533 U.S. 289, 296 n.5 (2001).

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, 110 Stat. 3009-546, all of the courts of appeals that had addressed the issue uniformly agreed that a parent's lawful unrelinquished domicile could be imputed to an unemancipated minor for the purpose of satisfying the eligibil-

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[1] This provision is generally referred to as Section 212(c), its place in the INA. In this brief, we refer to the current version of the cancellation-of-removal provision by its place in Title 8 of the United States Code.

[2] The Board of Immigration Appeals (BIA) and courts interpreted this provision to apply to aliens in deportation as well as exclusion proceedings, so long as the inadmissible or deportable alien was a lawful permanent resident and had accrued seven years of lawful unrelinquished domicile in the United States. See *Judulang*, slip op. 2-4.

ity requirements for a Section 212(c) waiver. *Morel* v. *INS*, 90 F.3d 833, 840-841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998); *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1022 (9th Cir. 1994); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992). This settled judicial construction of former Section 212(c) allowing imputation was based in part on the courts' view that children lacked the legal capacity to form their own domicile. See, *e.g.*, *Rosario*, 962 F.2d at 224 (noting that under the common law understanding of domicile, "[a] minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile") (citing *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989)).

The courts recognized "Section 212(c) was enacted to provide relief from deportation for those who have lawfully formed strong ties to the United States," and "[b]ecause children naturally form the strongest of ties to the place where their parents are domiciled and they with them, section 212(c)'s core policy concerns would be directly frustrated by the government's proposal to ignore the parent's domicile in determining that of the child." *Lepe-Guitron*, 16 F.3d at 1025; see also *Morel*, 90 F.3d at 841 (same); *Rosario*, 962 F.2d at 224 (explaining that "[t]his connection with the parent—and, by extension, with this country—evinces the type of bond that the statute was designed to protect from unwarranted severance").

2. In 1996, Congress enacted IIRIRA, replacing former Section 212(c) with a new "cancellation of removal" provision codified at 8 U.S.C. § 1229b(a). See 110 Stat. 3009-597; *Judulang*, slip op. 4. This provi-

sion sets out the eligibility criteria for cancellation of removal for specified aliens as follows:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

It appears that Congress replaced Section 212(c) with Section 1229b(a) to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082-04, S6104 (1995).[3] In particular, the courts of appeals at the time were divided on when an alien began accruing the years of domicile

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[3] This explanation for the provision was offered by the Justice Department in connection with a predecessor bill to IIRIRA, the Immigration Enforcement Improvements Act, S. 754, 104th Cong. (1995). See 141 Cong. Rec. S6082-04, S6092 (May 3, 1995). The statement in text is taken from the Department's section-by-section commentary on the unenacted bill, which contained a version of the cancellation of removal provision virtually identical to the provision codified at 8 U.S.C. § 1229b(a).

required to qualify for relief. Three circuits had held that an alien could begin accruing years of domicile *prior* to acquiring LPR status;[4] the Board of Immigration Appeals (BIA) and two other circuits, in contrast, had concluded that an alien began accruing years of domicile only *after* the alien acquired lawful permanent resident (LPR) status.[5]

Congress resolved this disagreement through the enactment of Section 1229b(a), requiring five years as a lawful permanent resident and seven years in any status after lawful admission as a prerequisite for relief; the latter provision allows aliens to begin accruing years of residence after entering the United States on a non-permanent visa, such as a student visa. The legislative history of IIRIRA does not contain any indication that Congress considered the then-settled imputation rule during the passage of the bill.

At the time that Congress enacted IIRIRA, some of the terms used in Section 1229b already were defined in the INA. Thus, the INA defines the phrase "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigrant laws,

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[4] See *White* v. *INS*, 75 F.3d 213, 216 (5th Cir. 1996); *Castellon-Contreras* v. *INS*, 45 F.3d 149, 152-154 (7th Cir. 1995); *Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977).

[5] See *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 249 (4th Cir. 1981); *In re S.*, 5 I. & N. Dec. 116, 117-118 (B.I.A. 1953). The Ninth Circuit initially agreed with the BIA and the Fourth and Tenth Circuits (see *Castillo-Felix* v. *INS*, 601 F.2d 459, 467 (9th Cir. 1979)), but later changed its position. See *Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995).

such status not having changed." 8 U.S.C. § 1101(a)(20). "Residence" is defined in the INA as being the alien's "place of general abode; the place of general abode means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). And the INA defines the word "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). An alien may be admitted into the United States by entering at a port of entry or by applying for adjustment of status under the INA while already in the country. See *In re Alyazji*, 25 I. & N. Dec. 397, 399 (B.I.A. 2011) (noting that "the Board has often held that adjustment of status is an 'admission'").

B. Proceedings Below

In October 1995, at the age of fifteen, respondent became a lawful permanent resident. Pet. App. 10a. His mother, however, had become a lawful permanent resident in 1989, when respondent was nine years old. Resp. Opening Br. 3 & n.2, *In re Damien Antonio Sawyers*, A44-852-478 (B.I.A. 2007), *available at* Admin. Rec. 8. The government states that the record does not indicate whether Sawyers had been present in the United States prior to his admission as an LPR in 1995. U.S. Br. 9.

On August 9, 2002, respondent was convicted in Delaware state court of "maintaining a dwelling for keeping controlled substances." J.A. 30-44; Pet. App. 11a. The government subsequently began removal proceedings against him by filing a Notice to Appear charging (as amended) that he is subject to removal under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. Pet. App. 10a-11a. Respondent denied removability and, in the

alternative, sought cancellation of removal. J.A. 16-29, 49-55; Pet. App. 11a-13a. He contended that he satisfied the second prong of the Section 1229b(a) test for eligibility for cancellation because the period of his mother's lawful permanent residence in the United States could be imputed to him.[6]

In September 2007, after a hearing, the Immigration Judge (IJ) found respondent removable and further found that he was ineligible for cancellation of removal because his conviction in August 2002, when he had been a lawful permanent resident for just under seven years, cut off his period of residence for purposes of becoming eligible for relief from removal under Section 1229b(a)(2). Pet. App. 9a-14a. The IJ did not, however, expressly discuss whether respondent could impute his mother's period of lawful residence for the purpose of fulfilling Section 1229b(a)(2)'s seven-year continuous-residence requirement.

The BIA affirmed, specifically declining respondent's request for imputation. Pet. App. 7a. The BIA acknowledged the Ninth Circuit's decision in *Cuevas-Gaspar* v. *Gonzalez*, 430 F.3d 1013 (9th Cir. 2005), which had authorized imputation of a parent's period of continuous residence after lawful admission for the purpose of satisfying Section 1229b(a)(2)'s seven-year continuous-residence requirement. Pet. App. 7a.

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[6] At the time of his hearing, respondent had been an "alien lawfully admitted for permanent residence" for more than five years and therefore satisfied the first prong of the Section 1229b(a) test for eligibility. 8 U.S.C. § 1229b(a)(1). Additionally, the government concedes that respondent satisfies the third prong of the eligibility test. 8 U.S.C. § 1229b(a)(3) (the alien must not have been "convicted of any aggravated felony").

The BIA explained, however, that it had disagreed with the Ninth Circuit in a subsequent published decision (*In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007)), and followed that holding instead of the Ninth Circuit's ruling in *Cuevas-Gaspar*. Pet. App. 7a.

The Ninth Circuit reversed. Pet. App. 1a-2a. The court applied the rule of *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), in which it had rejected the BIA's decision in *In re Escobar*. Pet. App. 2a. The court concluded that, in light of *Mercado-Zazueta*, the BIA "must impute to [respondent] his mother's residency for purposes of cancellation of removal." Pet. App. 2a. The court remanded "on an open record for any further determinations that the BIA deems necessary," including findings "regarding the residency of [respondent's] mother and regarding whether [respondent] was a minor residing with her." Pet. App. 2a. The Ninth Circuit subsequently denied the government's petition for rehearing en banc without dissent. Pet. App. 3a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's brief is striking in its almost complete failure to offer an affirmative case for its position. It concedes that the imputation rule was settled prior to the enactment of Section 1229b(a)(2). U.S. Br. 27 (noting "the preexisting interpretation permitting imputation"). It does not suggest that Congress actually sought to abandon the imputation rule when it enacted the provision, or, indeed, thought about imputation at all. U.S. Br. 26, 27. It does not offer any reason of policy why Congress *would* have wanted to abandon the imputation rule, or to change the relief-from-removal provision in a

way that would advantage adults while harming children. And it appears to agree that immigration policy generally favors rules that encourage family unification. U.S. Br. 29 (noting "[t]he general preference for family unity"). Almost the entirety of its brief therefore is devoted to arguing (unsuccessfully, as we will explain) why these considerations do not compel recognition of an imputation requirement. Even the government's appeal to agency deference is defensive, arguing not why the agency is right or reasonable, but why its position is not inconsistent with its past pronouncements or with the federal immigration policy favoring family unification.

Against this background, the government really offers only two defenses of the BIA's approach. The first is that Section 1229b(a)(2)'s reference to "the alien" necessarily precludes imputation; but that reading of the statute is obviously wrong, having been rejected even by those courts that ultimately deferred to the agency on the imputation question. The second is that Congress's substitution of the term "resided continuously" for "domicile" in Section 1229b(a)(2) eliminated consideration of intent from the statutory test and thus (perhaps inadvertently) precluded imputation. But that, too, is incorrect: The term "resided continuously" has always been understood to require an inquiry into intent, and the BIA has itself long imputed residence in a range of contexts.

Congress accordingly would have understood the language it chose to provide for imputation; it would have had no reason to eliminate imputation, even as it liberalized the relief-from-removal rule in other respects; and it would have seen imputation as wholly consistent with broader immigration policy. By focus-

ing only on the statutory definition of "residence," while ignoring the well-established meaning of "resided continuously," the government disregards these compelling considerations.

A. Relying on the statute's use of a "definite article" in referring to "*the* alien," the government contends that the plain language of Section 1229b(a)(2) precludes imputation. But the courts of appeals have uniformly rejected this argument, for good reason: It assumes its conclusion. The question is what years of continuous residence are attributable to "the alien" seeking relief. If more than seven years that the applicant's parent spent residing in the United States are imputable to the applicant, "the alien" seeking relief has, as a legal matter "resided in the United States continuously" for the relevant period. Section 1229b(a)(2) does not differ in this respect from other provisions of the immigration law in which the BIA has recognized imputation as permissible or, for that matter, from Section 212(c) itself.

B. Congress plainly did not intend to displace the imputation rule. That rule had been embraced by every court to consider it prior to the enactment of IIRIRA. The government agrees that Congress did not change the language of Section 212(c) *for the purpose* of displacing the rule, and does not suggest that Congress had expressed dissatisfaction with imputation in any respect. And the government offers no reason why Congress would have wanted to bar imputation. In fact, there is every reason to believe Congress had no such intent: Elimination of imputation would be inconsistent with Congress's use of language that liberalized the rules governing the availability of relief from removal in significant respects; would run counter to Congress's broader im-

migration goal of favoring family unity; and would suggest, perversely, that Congress intended to favor adults while disadvantaging children.

C. The government contends that the change in language from "unrelinquished domicile" to "resided continuously" necessarily precludes imputation because (1) courts impute intent from parent to child and (2) domicile, but not residence, "turns on intent." U.S. Br. 28. The government is wrong, in two respects.

For one, "resided continuously" is a term of art in immigration law that has always required consideration of intent. Long before the enactment of IIRIRA, the BIA had taken the position that determination of "continuous residence" required looking to whether the applicant had an "intent to abandon residence in the United States." *In re A.*, 4 I. & N. Dec. 723, 725 (B.I.A. 1952). And in the context of another provision of the INA, the BIA had said that a child's "*residence* is imputed [from] his parents while a minor" (*In re Ng*, 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added))—notwithstanding the presence in the INA of 8 U.S.C. §1101(a)(33), which defines "residence" (but not "*continuous* residence") without regard to intent.

That is unsurprising; the element of intent comes into play when determining whether the residence was *continuous*. In other words, even if "residence" or "residing" does not have a mental-state component, "continuously" does. This Court likewise equated unrelinquished domicile with continuous residence. Congress is presumed to have been aware of this background when it drafted Section 1229b(a)(2), and thus would have thought the lan-

guage of that provision to be wholly consistent with imputation.

In addition, residence, even regarded as a "principal, actual dwelling place in fact," has consistently been imputed from parent to child as an element of the imputation of domicile. Residence must be established for domicile to be present; a person domiciled in a particular place *must* also be resident there. As a consequence, the pre-IIRIRA courts that imputed domicile under Section 212(c) necessarily were imputing not only the parent's intent to remain in the United States permanently, but also the parent's residence in the United States. For this reason as well, Congress would have expected its choice of the term "resided continuously" to continue to permit imputation under Section 1229b(a)(2).

D. The government cannot escape this conclusion by invoking principles of agency deference. Viewed in context, the statute is not ambiguous at all. Congress chose language for Section 1229b(a)(2) that it would have understood to permit imputation; it makes no sense to believe that Congress implicitly eliminated parent-child imputation even while liberalizing the relief-from-removal provision in other respects; and the government's reading runs counter both to the broader policy of immigration law and to the principle that requires construction of ambiguous language in the alien's favor. But even if there were uncertainty here, the BIA's approach would not be entitled to deference. The Board has been wildly inconsistent in its treatment of imputation, allowing it in circumstances similar to those here when it harms, but not when it aids, the alien. This is the paradigm of arbitrary agency action.

ARGUMENT

I. SECTION 1229b(a)(2) DOES NOT ALTER THE SETTLED IMPUTATION RULE APPLIED TO CANCELLATION OF REMOVAL PRIOR TO IIRIRA.

A. The Text Of Section 1229b(a) Furnishes No Support For The Government's Rejection Of The Well-Settled Imputation Rule.

At the outset, the government places considerable emphasis on the plain language of Section 1229b(a)(2). U.S. Br. 15-23. But the text of Section 1229b(a)(2) contains no indication that Congress intended to reject a rule that was uniformly accepted prior to IIRIRA. The language of Section 1229b(a)(2) reads much like that of Section 212(c) or any other provision where imputation applies; it contains no explicit language that either endorses or rejects the rule, but the context plainly implies the possibility of imputation. The government's contrary reading advocates a position that would read imputation out of the INA entirely, a position neither it nor the BIA endorses.

Notably, the courts that the government contends agree with its approach have *not* adopted the textual arguments the government offers here. To the contrary, the Third Circuit declared that "[t]he INA * * * does not expressly address the question whether parents' years of residence may be imputed to their minor children * * *. The cancellation of removal provision neither provides for such imputation nor disallows it." *Augustin* v. *Att'y Gen.*, 520 F.3d 264, 269 (3d Cir. 2008) (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843

(1984)). Thus, neither the Third nor the Fifth Circuit based its holding for the government on the statutory language. See *id.* at 267-271; *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009).

The courts rejected the government's linguistic argument for good reason. The government misstates the imputation rule, which does not imply that a parent is fulfilling the statutory criteria *on behalf* of his or her child; instead, "the alien" is fulfilling the requirements *him- or herself*, after the child's parents' years of domicile have been imputed. The government's argument therefore presupposes its conclusion: Only by rejecting the imputation rule in the first place can one argue that "the alien" is unable to fulfill the requirements of 1229b(a). If imputation of residence *is* permissible for a minor child, "*the* alien" necessarily will be deemed to have satisfied the seven-year residency requirement. For the same reason, the government's focus on the statutory phrase "after having been admitted" fails. U.S. Br. 17.[7]

In fact, the imputation rule is used elsewhere in the INA in just the way described above. Nowhere is the rule explicitly mentioned in the text of the statute—and there are other contexts where it has been held to apply despite the use of limiting articles such

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[7] The government also misunderstands the imputation rule when it conflates years of continuous residence, which is imputable, with date of admission, which is not. See U.S. Br. at 21-23. There is nothing inherently problematic about utilizing aliens' actual date of admission for the purposes of one provision, while imputing years of their parents' residence for another. Indeed, this is the natural consequence of *any* imputation rule. The government's claims that imputation would lead to "incongruous results" and would "nullify" the operation of other provisions are exaggerated and unexplained assertions.

as "the" or "an." See, *e.g.*, *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (imputing a mother's knowledge of her children's excludability even though the provision at issue (8 U.S.C. § 1182(k) (1988)) provided that the grounds for exclusion must be known to "*the* immigrant" (emphasis added));[8] see also *Vang* v. *INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (imputing a parent's resettlement status to a child for the purpose of applying an immigration regulation denying asylum to "an alien" who has "resettled" in another country).

Most notably, the government's textual argument applies equally to Section 212(c) itself, which says nothing of imputation but which the government acknowledges was understood to permit it.[9] Hence there is no merit to the government's assertion that Section 1229b(a) "leaves no room" for imputation (U.S. Br. 16); it leaves the same "room" as did Section 212(c).

Imputation is a pervasive and well-settled principle of immigration law, as we explain below in some detail, and Congress need not refer to it directly in contexts where it is understood to apply. *Alber-*

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[8] The statute in *Senica* stated in relevant part that "any alien" may be admitted in the Attorney General's discretion if the grounds for inadmissibility were not known to "*the* immigrant," including "in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission." 16 F.3d at 1014 n.2 (emphasis added).

[9] Section 212(c) referred to "aliens" rather than "the alien," but this distinction is irrelevant. "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular * * *." 1 U.S.C. § 1.

naz v. *United States*, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction which may arise."). Our point is not, as a general matter, that "the lack of an express bar cannot be read as affirmatively authorizing imputation" (U.S. Br. 20); it is the less ambitious one that the language Congress used in Section 1229b cannot plausibly be read to settle the matter in the government's favor.

B. Congress Did Not Intend To Alter The Imputation Rule When It Replaced The Phrase "Unrelinquished Domicile" With "Resided Continuously."

The plain language of Section 1229b thus does not answer the question in this case. But the statutory context does: Congress plainly did not mean to disturb the settled imputation rule.

1. Congress Did Not Alter The Statutory Text For The Purpose Of Altering The Imputation Rule.

As an initial matter, the government does not deny that the imputation rule *was* settled prior to the enactment of IIRIRA. And it nowhere argues that Congress altered the statutory language *for the purpose of* foreclosing the imputation rule. To the contrary, the government agrees with us that Section 212(c) was amended for an entirely different reason: to resolve the disagreement among the circuits as to "whether * * * seven years must follow the granting of LPR status to the alien or whether the alien could count years of domicile in the United States under some other lawful status preceding his adjustment to LPR status." U.S. Br. 25.

Within this context, the change from "unrelinquished domicile" in Section 212(c) to "resided continuously" in Section 1229b(a)(2) was a logical textual alteration specifically tailored for a particular purpose. Before IIRIRA, the BIA had held that aliens could accrue years of lawful unrelinquished domicile only when they had lawful permanent resident status. This is because "domicile" was understood to involve the lawful intent to make the United States one's home. The BIA reasoned that, unless an alien had LPR status, he or she could not *lawfully* intend to remain; any intent to remain indefinitely would contravene the terms of the alien's non-immigrant visa. See *In re S.*, 5 I. & N. Dec. 116, 117-118 (B.I.A. 1953).

Continuous residence, in contrast, could be accrued in any status.[10] As explored in further detail below, "unrelinquished domicile" and "resided conti-

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[10] This distinction between the terms is brought into sharp relief in court decisions pre-IIRIRA where INA Section 212(c) (unrelinquished domicile) intersected with 8 U.S.C. § 1255a (which requires continuous residence). For example, Section 1255a requires that an alien "continuously resided in the United States" as a temporary resident until he or she applies for LPR status. 8 U.S.C. § 1255a(b)(1)(B)(i); see also 8 U.S.C. § 1255a(b)(3)(A) (during temporary residence, "the Attorney General shall * * * permit the alien to return to the United States after such brief and casual trips abroad *as reflect an intention* on the part of the alien to adjust to lawful permanent resident status" (emphasis added)). The Seventh Circuit allowed the alien to count years spent residing continuously in lawful temporary status, under Section 1255a, toward years of lawful "unrelinquished domicile" under INA Section 212(c). See *Castellon-Contreras* v. *INS*, 45 F.3d 149, 154 (7th Cir. 1995); see also *infra* pp. 30-31 (discussing Section 1255's intent-based "continuous residence" requirement).

nuously" are concepts that have been treated very similarly in immigration law over the past sixty years. See, *e.g.*, *INS* v. *Phinpathya*, 464 U.S. 183, 191 (1984). The principal difference between the two concepts is that, while continuous residence does require the intent to *presently* remain, it does not require the intent to make the United States one's home *permanently*. It therefore is possible to reside in the United States continuously without having LPR status. As a consequence, the term "resided continuously" was an ideal one for Congress to use in Section 1229b(a)(2): The term imports most of the connotations of unrelinquished domicile (including an intent component), but avoids the ambiguity regarding the immigration status a resident must have.

As one commentator noted immediately after the amendment's passage, "IIRIRA *solves the problem of domicile* by requiring the alien's continuous residence for seven years after the alien has been admitted in any status." Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240a of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 Geo. Immigr. L.J. 65, 116 (1997) (emphasis added). This understanding of IIRIRA's purpose fully explains why Congress changed the phrase "unrelinquished domicile" to "resided continuously." The government accepts this explanation, and points to no evidence that Congress had any other motive when removing the word "domicile" from the statute. Congress did not alter the relevant statutory language in order to foreclose the imputation rule.

2. *Congress Cannot Have Intended To Remove The Imputation Rule Because Such A Desire Would Be Inconsistent With The Effect Of Section 1229b And With The INA As A Whole.*

Indeed, far from acting *to* eliminate imputation, such an outcome would be inconsistent with the broader congressional purpose. The change from Section 212(c) to Section 1229b(a) generally liberalized the showing of presence in the United States that must be made to qualify for relief from removal. Thus, aliens now are allowed to count two years prior to their accrual of LPR status toward the seven-year residence requirement; under the BIA's prior interpretation of Section 212(c), aliens had to be domiciled in the United States for seven years *after* they became legal permanent residents to be eligible for cancellation of removal. In addition, for reasons we have just explained, it is easier to demonstrate continuous residence than domicile because the latter requires a showing of an intent to reside in the United States *permanently*, while the former does not.

The change from Section 212(c) to 1229b(a) therefore makes it more likely that aliens will successfully petition for cancellation, and likely leads to more aliens being able to remain in the United States. See Griffith, *supra*, at 116. ("It stands to reason, therefore, that this change in statutory language should benefit the alien by removing any doubts about the alien's status preceding his admission as a permanent resident.").[11] In this context, it is im-

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[11] This is not to say that Section 1229b as a whole necessarily will lead to more aliens being allowed to remain in the United States, as it contains other new restrictions, including a bar on

plausible to suggest that Congress, in changing the phrase "unrelinquished domicile" to "resided continuously," had the intention of helping adult immigrants by liberalizing the eligibility requirements for relief even while radically reducing the availability of relief for immigrant children by eliminating the imputation rule.[12]

Any such intent is made especially improbable by the favorable treatment of children evidenced elsewhere in the INA. The legislative history of the INA demonstrates this general intent to favor children. See H.R. Rep. No. 85-1199, at 6 (1957) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children * * *.").

Similarly, the INA shows a clear preference for family unity, as we also explain below in more detail and as the government acknowledges. U.S. Br. 29. To be sure, the government devotes much space to explaining that this preference does not "trump" the

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relief for aliens who have committed certain crimes and a stop-time provision. U.S. Br. 24. But with respect to the critical change in statutory language that the government relies on here (from "unrelinquished domicile" to "resided continuously"), it is undeniable that the purpose of Congress in amending the statute was to benefit immigrants who had lived in the United States for at least seven years but not for seven years with LPR status.

[12] In fact, Congress took steps to avoid enacting provisions in IIRIRA that had punitive effects on immigrant children. Thus, when signing IIRIRA into law, President Clinton noted that the law "does not include the so-called Gallegly amendment, which * * * would have allowed States to refuse to educate the children of illegal immigrants." Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. 3388, 3391 (1996) (signing statement of Pres. Clinton).

plain language of the statutory text. U.S. Br. 29-33. This is certainly correct, but it is not responsive to our point—which is that consistent congressional policy surely is a relevant consideration in trying to discern Congress's intent in altering statutory language. Absent a clear indication in the text or history of Section 1229b(a)(2), the Court should not understand Congress to have enacted that provision to achieve an end that is inconsistent with the language and structure of the rest of the INA. *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must 'be read as a whole.'" (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And because the INA shows a clear preference for family unity, it is most improbable that Congress altered the text of Section 212(c) in a way that would undermine that goal.

3. The Government Cannot Rely On The Assertion That Congress Was Ignorant Of The Imputation Rule As A Reason To Reject It.

Against this background, the government is attempting to make lemons into lemonade when it declares that there is no indication Congress "considered the possibility, let alone intended, that the period of LPR status or residence after lawful admission of * * * the alien's parent * * * would satisfy the new statutory requirements." U.S. Br. 26. We look at this same history and draw quite a different conclusion: The government can point to *no* evidence that Congress *intended* to change the settled imputation rule, evidence one would have expected to find if Congress truly meant to specially disadvantage children and depart not only from the established rule of imputation, but also from general INA policy.

Nor can the government escape this conclusion by arguing that "there is no indication that the imputation issue was ever called to the attention of Congress." U.S. Br. 27. "We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1795 (2010). "[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the * * * rule and legislated with it in mind." *Albernaz*, 450 U.S. at 341-342. Congress is "predominantly a lawyers' body" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), and it is appropriate "to assume that our elected representatives * * * know the law." *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-697 (1979). See also *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 116-117 & n. 13 (2002); *U.S. R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (stating that we should not assume "Congress was unaware of what it accomplished.").

The government's assumption of congressional ignorance not only violates accepted norms of statutory interpretation but is also facially implausible. The overwhelming number of immigration cases arise in the Second and Ninth Circuits,[13] which had

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[13] While data disaggregating the number of immigration cases from all administrative cases is unavailable prior to 2000, recent data demonstrates the disproportionate number of immigration cases arising in the Second and Ninth Circuits. In 2010, for example, the Ninth Circuit received 3,169 appeals from the BIA, and the Second Circuit heard 1,299. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts, 2010 Annual Report of the Director 97, 100 tbl. B-3. The combined total from these two circuits represents almost two-thirds of the 6,750 total appeals from the BIA. *Id.* at 96.

both adopted the imputation rule pre-IIRIRA, and the imputation rule therefore likely would have applied to the vast majority of aliens in the United States at the time of IIRIRA's enactment. It is highly unlikely that Congress was unaware of a settled rule that affected most of the aliens in the nation. Certainly, the government's unsupported assertion to the contrary offers no basis for accepting its proposed rule.

C. "Resided Continuously" Is A Term Of Art With A Longstanding And Well-Settled Meaning In The Immigration Context, And Includes Imputable Components Of Intent And Residence.

Against this background, the government's argument from the text and policy of Section 1229b(a)(2) reduces to a single proposition: that, even if unintentionally, Congress eliminated the imputation rule by hinging the availability of relief on the applicant's having "resided continuously," rather than on having maintained "unrelinquished domicile," in the United States. This is "meaningfully different operative language," the government maintains, because "domicile turns on intent, whereas residence does not"; the imputation rule rested on imputation of intent; and "there is no longer any intent-based requirement on which imputation (or ratification thereof) could be predicated." U.S. Br. 28-29. But even disregarding the improbability of the assertion that Congress achieved such a significant change inadvertently, this argument is wrong as a textual matter, for two reasons: The language used by Congress in Section 1229b(a)(2) *does* hinge the availability of relief on intent; and residence *was* imputed under Section 212(c).

1. A Test That Requires A Finding That The Applicant "Resided Continuously" In The United States Requires Consideration Of The Applicant's Intent.

In arguing that Section 1229b(a)(2) must have the effect of repudiating the imputation doctrine, the government notes that 8 U.S.C. § 1101(a)(33), defines "residence" without regard to intent. U.S. Br. 28. But Section 1229b(a)(2) uses a different term, "resided * * * continuously," which is not defined in the INA. And that term—which appears at numerous points in the INA—is a term of art that has long been used and has *always been understood to include an intent component*, notwithstanding the presence in the INA of Section 1101(a)(33), which was drafted almost sixty years ago. In this respect, the term "resided continuously" is no different from the term "unrelinquished domicile" that, as used in Section 212(c), was understood to allow for imputation. If intent (and a child's legal inability to formulate it) is the linchpin of imputation, Section 212(c) and Section 1229b(a)(2) are in the relevant sense identical.

a. "Resided continuously" is a term of art in immigration law that has always required consideration of intent. That is clear from the BIA's decisions pre-IIRIRA (the backdrop against which Section 1229b(a)(2) was enacted) that intent was central to determinations of continuous residence.[14]

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[14] Unlike "unrelinquished domicile," which now appears nowhere in the INA and appeared only in Section 212(c) before IIRIRA, "resided continuously" appears throughout the INA. See, *e.g.*, 8 U.S.C. §§ 1254a, 1255a, 1259, 1427, 1430, 1435, 1437, 1439, 1445.

In 1952, the same year that Congress enacted the INA, the BIA interpreted a 1940 statute under which the appellant would be a citizen provided she "ha[d] *resided continuously in the United States* since the date of her marriage." *In re A.*, 4 I. & N. Dec. 723 (B.I.A. 1952) (emphasis added). The Board wrote:

> [T]he term "resided continuously" within the United States has been found in laws relating to naturalization since the basic naturalization act of June 29, 1906. It was well settled at the time of the amendment of July 2, 1940 * * * that temporary absences *unaccompanied by an intent to abandon residence in the United States*, did not operate to interrupt the continuity of residence * * *.

Id. at 725 (emphasis added). The Board found that the "continuity of residence" was not broken because, in the circumstances, "a finding of abandonment of domicile in the United States is required" to show an intent to abandon residence in the United States. *Ibid.* Thus, the Board equated non-abandonment of domicile in the United States—that is, unrelinquished domicile—with "resided continuously."[15] *Ib-*

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[15] The equivalence of continuous residence and unrelinquished domicile also can be seen in Board interpretations of Section 212(c). See, *e.g.*, *In re Loza-Bedoya*, 10 I. & N. Dec. 778, 779 (B.I.A. 1964) ("The first contention couples Section 212(c) of the Act and its predecessor, the 7th proviso to Section 3 of the Act of February 5, 1917. *Section 212(c) of the Act authorizes the admission of an inadmissible alien returning to a lawful residence*; the 7th proviso authorized the same relief (except as to documentary grounds) to an alien with seven years' residence whether the residence was lawful or not." (emphasis added)). Even though Section 212(c) used the term "domicile," the Board wrote interchangeably of "residence."

id. It was the "intent to abandon" (or not) that determined continuity of residence. *Ibid.*[16]

The importance of intent to the abandonment of continuous residence, as well as of unrelinquished domicile, has been an element of immigration law ever since. For example, it is well established that an immigrant may maintain a continuous (or permanent) residence in the United States despite a temporary visit abroad. See, *e.g.*, *Singh* v. *Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997) ("[A] legal permanent resident may plan * * * a relatively short trip. He may extend his trip beyond that relatively short period * * * if he intends to return to the United States as soon as possible thereafter."). In determining whether temporary visits abroad break periods of continuous or permanent residence, it is "the *intention* of the alien, when it can be ascertained, [that] will control." *In re Huang*, 19 I. & N. Dec. 749, 753 (B.I.A. 1988) (emphasis added).[17] That intent is assessed

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[16] This was not a novel conclusion. For the purpose of the precursor to INA Section 212(c), "domicile" was considered "synonymous with actual residence or place of abode." *In re C.*, 1 I. & N. Dec. 631, 633 (B.I.A. 1943). Domicile was further defined by regulation to mean "that place where a person has his true, fixed, and permanent home and principal establishment and to which whenever he is absent he has the intention of returning." *Id.* at 635-636. "Note should be made in this connection that *the courts regard residence and domicile as synonymous terms* under the naturalization statutes." *Id.* at 638 (emphasis added).

[17] That continuity of residence turns on intent rather than physical presence is reflected in the text and structure of Section 1229b. Physical presence ends when an alien "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2). No such concrete or objective limitation determines continuous residence.

based on such factors as "location of his family ties, property holdings, and job." *Ibid.* And because a child is incapable of forming the relevant intent—or, for that matter, ties based on property holdings and vocation—a child's "*residence* is imputed [from] his parents while a minor" in making the continuous residence determination. See *In re Ng*, 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added).

It is not at all surprising that Congress and the BIA understood the terms of art "resided continuously," "temporary residence," and "permanent residence" to require consideration of intent even when the location of the alien's physical residence could be determined; the term "residence" has, in the common law, always contained an intent component. See *Martinez* v. *Bynum*, 461 U.S. 321, 330 (1983) ("'residence' generally requires both physical presence and an intention to remain."). As the New Jersey Supreme Court put it, in a decision cited approvingly by this Court in *Holyfield*, 490 U.S. at 48:

> At common law, residence and domicile were not synonymous, the difference between them being one of intention. Thus, *for residence there must have been an intention to live in a place for the time being*, whereas, for domicile * * * it was necessary that there be an intention not only to live in the place but also to make a home there.

Perri v. *Kisselbach*, 167 A.2d 377, 379 (N.J. 1961) (emphasis added). This common law definition of residence remains the law today. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 517 (1999) (residence requires "both physical presence and an intention to remain"). Congress thus would not have regarded it as at all ano-

malous for a "resided continuously" test to require consideration of intent.

b. This Court also has noted the similarity between "continuous residence" and domicile in immigration law, and has recognized that *both* residence and domicile are distinct from the concept of "continuous physical presence." Thus, in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), the Court held that continuous physical presence, unlike continuous residence, is terminated by temporary absence. A law enacted in 1948 had allowed suspension of deportation for aliens who "resided continuously in the United States for seven years or more." *Id.* at 190. The law was subsequently changed to replace the "seven year 'continuous residence' requirement with the current seven year 'continuous physical presence' requirement." *Ibid.* In explaining the meaning of the current and former laws, the Court wrote: "Had Congress been concerned only with 'non-intermittent' presence or with the mere *maintenance of a domicile or general abode*, it could have retained the 'continuous residence' requirement. Instead, Congress expressly opted for the seven year 'continuous physical presence' requirement." *Id.* at 191 (emphasis added).

The Court thus expressly equated "maintenance of a domicile" (*i.e.*, unrelinquished domicile) with "continuous residence."[18] *Phinpathya* was the leading

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[18] The distinction between continuous residence and continuous physical presence embraced by the *Phinpathya* Court had been recognized two decades earlier by the BIA. Prefiguring the Court's approach, the Board wrote:

> The Congress of the United States in amending [Section 244(a) of INA in 1962] had an opportunity to change the terminology of the statute to require continuous residence in the United States instead of continuous physical

interpretation from the Court of the meaning of "resided continuously" in immigration law before IIRIRA, and it underscores the settled meaning of the term of art that Congress is presumed to have shared when enacting Section 1229b(a)(2).

c. Additional evidence that Congress has been aware of both the meaning of "resides continuously" and of the distinction between continuous residence and continuous physical presence comes from 8 U.S.C. § 1255a, which was enacted before IIRIRA. Section 1255a allows illegal immigrants to acquire temporary resident status (8 U.S.C. § 1255a(a)) and then permanent resident status. 8 U.S.C. § 1255a(b). To be eligible for temporary resident status, the alien must have resided continuously (and unlawfully) in the United States since 1982, and have been continuously physically present in the United States since November 1986. This statute preserves the distinction between physical presence and residence embraced by the Court in *Phinpathya*. Section 1255a, however, modifies the strict meaning of continuous physical presence (*no* absences from the United States) embraced by the Court in *Phinpathya*, expressly allowing for "brief, casual, and innocent absences from the United States." 8 U.S.C. § 1255a(a)(3)(B). Continuous residence, under 8 U.S.C. § 1255a(a), is less exacting than continuous physical presence, allowing for absences from the United States with the intent to return.

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presence. Congress failed to make any such change in the continuous physical presence requirements * * *. Clearly, the term "continuous physical presence" can in nowise be equated with the term "continuous residence."

In re Graham, 11 I. & N. Dec. 234, 238 (B.I.A. 1965).

The importance of intent to return to continuous residence is made explicit with regard to the second provision of 1255a (8 U.S.C. § 1255a(b)), which allows conversion of temporary resident status to permanent resident status. Continuous residence as a temporary resident (which is necessary for permanent residence) is not interrupted by

> brief and casual trips abroad as *reflect an intention* on the part of the alien to adjust to lawful permanent resident status * * * and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

8 U.S.C. § 1255a(b)(3)(A) (emphasis added).

d. It should be added that the government mentions the INA's definition of "residence" in Section 1101(a)(33) in connection with its discussion of intent almost in passing. See U.S. Br. 28. There is good reason for that; the context and purpose of the provision shows that it has no bearing on the question here.

Section 1101(a)(33) was first enacted as part of the original INA in 1952 to codify this Court's definition of "residence" in *Savorgnan* v. *United States*, 338 U.S. 491 (1950). In that decision, the Court interpreted a nationality act that stipulated that expatriation of nationals could occur, in part, "if and when the national thereafter takes up a residence abroad." 338 U.S. 491, 493 n.2 (1950) (quoting Nationality Act of 1940, Section 403). That same statute stated that, in relevant part, "the place of [the] general abode shall be deemed [the] place of residence." *Id.* The petitioner had resided in Europe with her husband, an Italian citizen, for many years, but the

district court found that she "did not intend to establish a 'permanent residence' in any country other than the United States." *Id.* at 495-496 (citing *Savorgnan* v. *United States*, 73 F. Supp. 109 (W.D. Wis. 1947)). But this Court found that intent was irrelevant for the purposes of establishing a "residence abroad":

> In contrast to such terms as: 'temporary residence,' 'domicile,' 'removal, with his family and effects,' 'absolute removal' or 'permanent residence,' the new Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of residence,' it required only that it be the 'place of general abode.'

Id. at 504-505. The Court thus contrasted the unadorned term "residence" with qualified uses of the term, such as "temporary residence" and "permanent residence," as well as with "domicile." Unlike all of those other terms, "residence" used in isolation was understood to "denote an objective fact."

The meaning of "residence" as used in *Savorgnan* was codified in 1952 as 8 U.S.C. § 1101(a)(33). The report that accompanied the bill, from the House Committee on the Judiciary, stated: "This definition is a codification of judicial constructions of the term 'residence' as expressed by the Supreme Court of the United States in Savorgnan v. United States (338 U.S. 491 (1950))." H.R. Rep. No. 82-1365, at 33 (1952).

The definition of "residence" in Section 1101(a)(33) thus has no bearing on the meaning of a term like "resided continuously," in which "resides" is qualified by a temporal or descriptive term that nec-

essarily turns on intent. That proposition is not controversial. In fact, it has been expressly embraced by the BIA itself in its application of the term "lawful permanent residence," a companion term to "resided continuously" that also appears in Section 1229b(a). As to that, the BIA has held: "The definition of 'residence' in section 1101(a)(33) of the Act, which would preclude consideration of the alien's 'intent' in proceeding or remaining abroad, is inapplicable in determining whether an alien has abandoned her lawful permanent resident status." *Huang*, 19 I. & N. Dec. at 754. Exactly the same conclusion applies here. Whether someone has "resided continuously" in the United States for a given period always has been understood to turn on that person's intent, and in that respect the language of Section 1229b(a)(2) is identical to that of Section 212(c).

2. *"Residence" As A Legal Construct Consistently Has Been Imputed As An Element Of Domicile.*

Congress accordingly used a term in Section 1229b(a)(2)—"resided continuously"—that it would have known would require an inquiry into intent, and thus would have led to imputation of a parent's "continuous residence" to a child. But even if that were not so, Congress would have expected a parent's residence to be imputed to a child for a different reason: Residence, even as a "principal, actual dwelling in fact," has consistently been imputed from parent to child as an element of the imputation of domicile.

Domicile and residence are in large part coextensive because those domiciled in a particular place must also be resident there. More than a century ago, this Court described domicile as "[a] residence at

a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." *Mitchell* v. *United States*, 88 U.S. 350, 352 (1874) (citation omitted). The definition of domicile as a union of current residence and intent to make that residence one's "home" has been universally accepted by the common law ever since. See, *e.g.*, *Texas* v. *Florida*, 306 U.S. 398, 424 (1939) ("[R]esidence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile").

As a consequence, in each instance where courts imputed a parent's domicile to a child under Section 212(c), they also, by extension, necessarily imputed the parent's residence to the child because there can be no domicile without residence. Thus, none of those pre-IIRIRA courts required a showing that the child was present in the United States during his or her parents' period of domicile. See, *e.g.*, *Rosario*, 962 F.2d at 225. Although the opinions pointed to the "intent" component of domicile in explaining the imputation rule, the courts notably did not require that the child separately establish residence in the United States during this period. If they had done so, they would have been imputing the parent's intent *only*. Instead, as the *Rosario* court put it, "a minor admitted into the United States might derive lawful domicile from a parent already present for seven years, thereby making that person eligible for § 212(c) relief *on the very day of arrival*." 962 F.2d at 225 (emphasis added).

Courts accordingly were imputing more than the parent's intent to remain—they were imputing the parent's period of residence as well. And the reason they did so is clear: The common thread running

through the immigration cases is the child's lack of capacity independently to satisfy the legal requirement. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1026 (imputation required "since most children are *presumed not legally capable* of forming the requisite intent" (emphasis added) (quoting *Rosario*, 962 F.2d at 224)); see also *Mercado-Zazueta*, 580 F.3d at 1105 ("[W]e have allowed imputation precisely because the minor either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents." (internal quotation marks omitted)).

Congress therefore must have understood the reasoning of these decisions to extend to all areas where a child lacks legal capacity. For example, children lack the capacity to navigate the "complications" of the immigration system on their own. See *Mercado-Zazueta*, 580 F.3d at 1112. Similarly, a child lacks the legal capacity to prove that a particular dwelling is his or her "principal" one. Such a determination is made through examination of the "typical indicia of residence [such] as the maintenance of a bank account in this country and continued membership in a domestic union." *Mrvica* v. *Esperdy*, 376 U.S. 560, 565 (1964). A child lacks the capacity to acquire these "typical indicia": "Children * * * normally lack the material and psychological wherewithal to decide where they will reside." *Mozes* v. *Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001).

Thus, the language, context, and policy of the statute lead to a conclusion quite different from that drawn by the government. At the time Congress enacted Section 1229b(a)(2), the imputation rule was settled and noncontroversial. No one suggests that Congress acted with the purpose of changing that

rule; such a suggestion could not be squared with actions Congress took to liberalize the rules governing eligibility for relief in other respects. And Congress chose language for Section 1229b(a)(2) that, in relevant part, is analytically identical to the superseded language of Section 212(c)—and that Congress is presumed to have known would have provided for imputation. The government's contrary submission, which rests on the proposition that Congress accidentally eliminated imputation through its choice of a term selected for a different reason, simply does not stand up to scrutiny.

II. THE BIA'S REJECTION OF IMPUTATION IS NOT ENTITLED TO DEFERENCE.

Having little else to say, the government ultimately retreats to an argument for deference to the BIA under step two of the *Chevron* analysis. But viewed in context and in its entirety, Section 1229b(a)(2) must be read to permit imputation; there is no room for deference to the agency. And even if that were not the case, the BIA's approach should be rejected as "arbitrary or capricious in substance" in light of the agency's inconsistent positions regarding imputation, and as "manifestly contrary to the statute" considering the INA's overarching purposes. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011) (quoting *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 242 (2004)).

A. The Meaning Of Section 1229b(a)(2) Clearly Supports Imputation, Leaving No Reason To Defer To The Agency Under *Chevron*.

Under step one of the *Chevron* analysis, the Court will first consider whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As the Court explained in a decision interpreting a different aspect of IIRIRA's alteration of former INA Section 212(c), "We only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (quoting *Chevron*, 467 U.S. at 843 n.9). Here, the ordinary tools of statutory construction show that the purpose of Section 1229b(a)(2) is unambiguous and leaves no room for the exercise of agency discretion.

First, as we have explained, Congress did not mean to disturb the settled construction of the former Section 212(c); it chose language that would have been understood to provide for imputation; and rejection of imputation runs counter to the thrust of the liberalized relief provision. Second, Section 1229b(a) should be read in light of the INA's overall and undisputed goal of promoting family unity. *Cf. Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004) (finding that "regular interpretative methods," including the structure and history of the statute and its "relationship to other federal statutes," leave no room for *Chevron* deference on the question at issue). And third, the Court generally applies the "longstanding principle [in immigration law] of construing any lingering ambiguities in deportation sta-

tutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)). These usual tools of statutory construction lead to a conclusion that children should be able to impute their parents' period of continuous residence under Section 1229b(a)(2), as they were under former Section 212(c).

B. Even If The Meaning Of The Statute Is Not Entirely Clear, The BIA's Interpretation Is Not Owed Deference.

Even if the Court rejects the conclusion that the statute clearly permits imputation of continuous residence after lawful admission, and finds that Section 1229b(a) is silent or ambiguous with respect to imputation, the BIA's refusal to allow imputation in this context is not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In fact, the government has remarkably little to say in favor of deference to the BIA's view. Most of its argument is negative; it asserts that its rejection of imputation here is not inconsistent with its use of imputation elsewhere (U.S. Br. 38-39), and that the Ninth Circuit's rationale for employing imputation is not supported by the statute. U.S. Br. 35-38. On the face of it, these arguments hardly serve to affirmatively justify the BIA's rule. Deference is owed to an administrative agency only if "Congress has explicitly left a gap for the agency to fill" *Chevron*, 467 U.S. at 843, and only "when the agency has exercised its *own* judgment, not when it believes that interpretation is compelled by Congress." *Arizona* v. *Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal quotation marks omitted). Since, here, the BIA believed its re-

sult was compelled by statutory language, it was not exercising its discretion and therefore is not owed deference. But even if that were not so, the government's arguments fail on their own terms.

1. The Board's Interpretation Has Been Inconsistent.

In arguing that the BIA's treatment of imputation has been consistent, the government maintains that the BIA has permitted imputation of intent but not of "objective conduct." U.S. Br. 39. But that is not so: In practice, the BIA has imputed both states of mind *and* objective conduct from parents to minor children in situations where imputation would harm the alien, but disallowed imputation in situations where imputation would benefit the alien. That is the essence of an interpretation that is "arbitrary or capricious in substance." *Mayo Found.*,131 S. Ct. at 711 (quoting *Pfennig*, 541 U.S. at 242).

On the one hand, as we have shown, continuous residence *does* turn on intent. The government offers no reason for treating it differently from those situations where it acknowledges that imputation is warranted.

And the converse is true as well: The BIA often does impute "objective conduct" from parents to children. Thus, in *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998), the court noted that the BIA imputes a parent's "firm resettlement" in a third country to children for the purposes of asylum eligibility in the United States; if an applicant for asylum is deemed to have "firmly resettled" in a third country, he or she is ineligible for asylum here. Agency regulations define "firm resettlement" as follows: "An alien is considered to be firmly resettled if, prior to arrival in

the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15. This definition of "firm resettlement" does *not* involve any sort of "intent" or "state of mind" element (unless, contrary to the government's contention, residence status is understood to have an intent component); rather, it involves objective conduct (entering a third country) and a government's "official action" with regard to the alien (offering some form of legal status).

The Board's analysis in *In re Ng* illustrates the agency's practice of imputing residence in making the "firm resettlement" determination. After noting that the asylum applicant's father owned a business in Hong Kong and was "certainly resettled" there, the Board stated that "[t]he applicant's *residence* is imputed to his parents while a minor." 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added). However this BIA rule is regarded, it is inconsistent with the government's position here; either residence turns on intent, or the agency imputes residence regardless of intent.

The BIA also has imputed objective circumstances under Section 212(k) of the INA, which provides an exception from inadmissibility for immigrants whose ineligibility for admission "was not known to, *and could not have been ascertained by the exercise of reasonable diligence* by, the immigrant." 8 U.S.C. § 1182(k) (emphasis added). The failure to "exercise * * * reasonable diligence" prong is not a mental state; it is objective conduct on the part of the parent. In *In re Aurelio*, 19 I. & N. Dec. 458 (B.I.A. 1987), the BIA "conclud[ed] that the female applicant

failed to exercise reasonable diligence in ascertaining her admissibility to the United States * * *. We therefore find that the immigration judge properly denied the applicants' [including the female applicant's minor son] section 212(k) waiver request." See also *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) ("The BIA's decision here was not a departure from its previous practice of imputing a parent's state of mind, *or failure to reasonably investigate*, to an unemancipated minor child." (emphasis added)).

The BIA's inconsistency on the treatment of imputation makes agency deference inappropriate. There can be little doubt that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993); see also *Judulang*, slip op. 18 (indicating that "we cannot detect the consistency that the BIA claims has marked its approach to this issue," and, "[t]o the contrary, the BIA has repeatedly vacillated in its method for applying § 212(c) to deportable aliens"); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("[I]nconsistency * * * in itself weakens any argument that the Board's interpretation is entitled to some weight.").

While *any* inconsistency "considerably" undercuts the deference owed to an agency's "interpretation" of a statute (*Cardoza-Fonseca*, 480 U.S. at 446 n.30), "[*u*]*nexplained* inconsistency" is an especially strong indicator of "arbitrary and capricious" reasoning (*Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added)) that precludes deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001). And an agency's consistency in application of the law applies

not just to singular statutory provisions, but to parallel areas of the statutes it administers. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (Congress is presumed to have intended to create coherent regulatory schemes). That is just what we have here.

2. The Board's Interpretation Of Section 1229b(a) Is "Manifestly Contrary To The Statute."

In addition, the Board's interpretation of Section 1229b(a) is "manifestly contrary to the statute" (*Mayo Found.*, 131 S. Ct. at 711), given that one of the overarching goals of the INA is promoting family unity. The structure of the visa family preference system, as well as specific provisions of the Act, supports this view. It would be contrary to the overall family-unity purpose of the Act to deny children the ability to impute their parent's continuous residence so as to achieve eligibility for cancellation of removal.

Three of the INA's four family preference categories are designed to reunite parents and children.[19] See 8 U.S.C. § 1153(a)(1) (allowing admissions for unmarried sons and daughters of U.S. citizens); 8

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[19] Congress places a particularly high priority on reuniting parents with minor children. For example, in 1990, Congress subdivided the second preference category into subsections A and B, to ensure that a higher percentage of admissions would go to spouses and minor children as opposed to children who had already reached age twenty-one. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. The history of the INA confirms this view. See H.R. Rep. No. 85-1199, at 6 (1957) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children * * *.").

U.S.C. § 1153(a)(2) (allowing admissions for spouses and minor children of lawful permanent residents); 8 U.S.C. § 1153(a)(3) (allowing admissions for married sons and daughters of U.S. citizens). The family preference system is an integral part of immigration law, and represents a significant proportion of the visas granted every year. In 2010, for example, 214,589 people entered under a family preference visa.[20] Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 18 tbl. 6 (Aug. 2011), *available at* http://tinyurl.com/3vcuse5.

Other provisions of the INA likewise demonstrate a clear preference for family unity. For example, Section 203(d) of the INA provides that spouses and children of aliens who qualify for a family-preference, employment-based, or diversity visa may be admitted in the same preference category, and in the "same order or consideration" as the principal alien. 8 U.S.C. § 1153(d). In addition, 8 U.S.C. § 1182(a)(6)(E)(ii) codifies the "[s]pecial rule in the case of family reunification." This provision provides a waiver of excludability for certain immigrants who "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in viola-

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[20] In addition, 476,414 people entered as immediate relatives of United States citizens in 2010. Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 18 (Aug. 2011), *available at* http://tinyurl.com/3vcuse5. The total number of people admitted lawfully to the United States was 1,042,625, so family-sponsored or immediate-relative entries (a combined total of 691,003 people) represent two-thirds of the total number of entries. *Ibid.*

tion of law." *Ibid.* And the legislative history of the INA more generally demonstrates that family unity was an extremely important consideration for the drafters of the INA. See H.R. Rep. No. 82-1365, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680 (commenting on "the underlying intention of our immigration laws regarding the preservation of the family unity").

Finally, imputation cannot be thought inconsistent with congressional intent on the theory, hinted at by the government, that it threatens vastly to expand the category of aliens allowed to remain in the United States. U.S. Br. 27. After all, the sole issue here is *eligibility* for cancellation relief, not cancellation itself. Thus, "any practical effect on policing our Nation's borders * * * is a limited one"; while respondent will be eligible to apply for cancellation if he prevails before this Court, "[a]ny relief he may obtain depends upon the discretion of the Attorney General." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010). See also *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480 (2010) (describing the "equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses"); *Mercado-Zazueta*, 580 F.3d at 1115 (noting that the Ninth Circuit's imputation rule "merely grant[s] access to the possibility of cancellation of removal, leaving the ultimate determination to the sound discretion of the Attorney General").

The Attorney General thus retains unreviewable authority to deny cancellation. See 8 U.S.C. § 1252-(a)(2)(B)(i). As a consequence, the only real effect of the rule we advocate is to *permit* the Attorney General to exercise his discretion in favor of an alien who merits relief, and who otherwise would be removed

from the country no matter how compelling his or her case to stay.

In all, the government's reading of the statute disregards the analytical consistency between the language of Section 1229b(a)(2) and Section 212(c); departs from the particular congressional goal in amending the relief provision and the broader purpose of the INA; and is inconsistent with the BIA's position in clearly analogous circumstances. The Court should reject such an approach.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for further proceedings.

Respectfully submitted.

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Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ON WRITS OF CERTIORARI
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FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Ninth Circuit has held that aliens who do not personally satisfy the eligibility requirements for cancellation of removal under 8 U.S.C. 1229b(a)(1) and (2)—that is, who have not had the status of a lawful permanent resident (LPR) for at least five years and who have not continuously resided in the United States for at least seven years after they have been admitted by immigration authorities—may nevertheless become eligible for such relief by relying on a parent's period of LPR

status and continuous residence after admission. The Ninth Circuit's imputation rule finds no support in the text of Section 1229b(a) or its legislative history, and it is contrary to the authoritative interpretation of the Board of Immigration Appeals (BIA or Board). Although respondents attempt to defend the rule by reference to lower courts' interpretations of other, differently worded immigration provisions and to general policy considerations, their efforts are unavailing.

A. The Plain Text Of Section 1229b(a) Does Not Permit An Alien To Rely On A Parent's Years Of LPR Status Or Residence After Admission By Immigration Authorities

Section 1229b(a) provides that, to be eligible for cancellation of removal, "the alien" seeking relief must, *inter alia*, "(1) ha[ve] been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) ha[ve] resided in the United States continuously for 7 years after having been admitted in any status." Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the terms "lawfully admitted for permanent residence" and "admitted" both refer to formal action taken by immigration authorities with respect to an individual alien. See 8 U.S.C. 1101(a)(20); 8 U.S.C. 1101(a)(13)(A). Sections 1229b(a)(1) and (2) require that the alien seeking relief personally achieve the requisite legal status, and remain in that status and reside in the United States for the requisite length of time.

Respondents do not dispute that the text of the statute requires that the alien seeking relief personally fulfill these requirements. They contend (Martinez Gutierrez Br. 16, 20; Sawyers Br. 14-15), however, that Section 1229b(a) is "silent" as to whether an alien can personally

fulfill these requirements by relying on *someone else's* years accrued in the requisite status.

Respondents' argument that Section 1229b(a) by its terms neither authorizes nor forecloses imputing a parent's (or other third party's) years as an LPR or of continuous residence after admission is not helpful to respondents' case: were Section 1229b(a) truly ambiguous on the point, then the BIA's reasonable interpretation of the statute as forbidding imputation would control. See Gov't Br. 33-39; pp. 18-22, *infra*. But the argument is also incorrect. As those courts that ultimately deferred to the BIA's interpretation have acknowledged, "[t]he requirements for cancellation of removal are clear." *Augustin* v. *Attorney Gen. of the United States*, 520 F.3d 264, 270 (3d Cir. 2008); see *Deus* v. *Holder*, 591 F.3d 807, 812 (5th Cir. 2009) (adopting the rationale of *Augustin*). An alien who has not in fact been an LPR for at least five years, or who has not in fact been admitted to the United States by immigration officials and resided continuously in the United States for at least seven years after that admission, has not fulfilled the statutory eligibility requirements for cancellation of removal, regardless of whether a parent (or any other third party) has done so.

It is true, as respondents emphasize, that Section 1229b(a) does not contain language specifically referring to a parent and foreclosing the possibility of imputing the parent's years in the requisite legal status. But "[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see Gov't Br. 20-21. There is no ambiguity here.

B. There Is No Settled Rule Permitting An Alien To Rely On A Parent's Period Of LPR Status Or Residence After Admission

Notwithstanding the clarity of Section 1229b(a)'s text, respondents argue (Martinez Gutierrez Br. 21-22, 28-29, 33-39; Sawyers Br. 14-36) that imputation is a well-accepted feature of immigration law and that Congress thus must have ratified the imputation rule when it enacted Section 1229b(a). But while certain forms of imputation have been permitted under other, differently worded provisions of immigration law, respondents can point to no settled rule that would permit a minor child to rely on a parent's years of LPR status or years of continuous residence in the United States after admission under Section 1229b(a).

1. Appellate decisions interpreting the term "domicile" in former Section 212(c) do not establish any settled understanding about imputing a parent's years of LPR status or residence after admission

a. Respondents' congressional ratification argument relies primarily on three court of appeals decisions interpreting Section 1229b(a)'s predecessor, former Section 212(c) of the INA, which authorized waiver of exclusion (and, by judicial and administrative interpretation, deportation) for "[a]liens lawfully admitted for permanent residence" who had accrued "a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (1988); see Gov't Br. 6 n.2.

The decisions on which respondents rely reasoned that the undefined term "domicile" must be construed in light of its meaning at common law. As this Court had explained in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989), an adult's "domicile" is

generally "established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Id.* at 48. But "[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Ibid.*; see also *ibid.* (noting that these principles mean that a child's domicile will sometimes be in a place he has never been). Following that common-law principle, courts of appeals construing former Section 212(c) concluded that parents' period of "lawful unrelinquished domicile" could be "imputed" to their minor children. *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) ("[A] child's domicile follows that of his or her parents."); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (similar) (citations omitted); see also *Morel* v. *INS*, 90 F.3d 833, 841 (3d Cir. 1996) (similar), vacated on other grounds, 144 F.3d 248 (3d Cir. 1998).

b. Respondents provide no persuasive reason to believe that the Congress that enacted Section 1229b(a) somehow ratified these interpretations of former Section 212(c), much less that Section 1229b(a) incorporates the result in those decisions. As an initial matter, with respect to Martinez Gutierrez, the ratification argument fails on its own terms. There was no consensus among the circuits that would have entitled him to relief even under former Section 212(c). To the contrary, the Ninth Circuit made clear that its imputation rule would *not* apply to an alien who, like Martinez Gutierrez (see Martinez Gutierrez Pet. App. 12a-13a), did not obtain LPR status before the age of 18, *Lepe-Guitron*, 16 F.3d at 1026 n.12, and no other court of appeals disagreed. This flaw greatly undermines respondents' reliance on a notion of ratification more generally.

More fundamentally, even assuming with respect to other applications of former Section 212(c) that three court of appeals decisions qualify as "a judicial consensus so broad and unquestioned that [this Court] must presume Congress knew of and endorsed it," *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005); but cf. *id.* at 351 (doubting force of a two-circuit consensus), the doctrine of congressional ratification applies only when Congress reenacts a statute without change, see *id.* at 349; *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2492 (2009). That is not the case here. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a), 110 Stat. 3009-594, Congress repealed former Section 212(c) and enacted a new relief-from-removal provision that differed in important respects from its predecessor. Section 1229b(a) preserved former Section 212(c)'s threshold requirement that the alien have been "lawfully admitted for permanent residence," but added an express durational requirement: that the alien have been in LPR status for at least five years. 8 U.S.C. 1229b(a)(1). It also replaced the seven-year "domicile" requirement with a requirement that the alien have resided continuously in the United States for seven years after admission in any status. 8 U.S.C. 1229b(a)(2).

The Congress that enacted Section 1229b(a) thus not only changed the language of former Section 212(c), but changed it to eliminate the very term—"domicile"—on which prior judicial decisions permitting imputation under Section 212(c) had rested. If Congress is presumed to have been aware of those decisions, then it must also be presumed to have intended that, by eliminating the word "domicile," it was eliminating the textual basis for

those decisions. Contrary to Martinez Gutierrez's suggestion (Br. 37), no other form of "disavow[al]" is needed to conclude that the enactment of Section 1229b(a) did not ratify and much less carry forward the result of those decisions.

2. The text of Section 1229b(a) differs materially from former Section 212(c)

Respondents (Martinez Gutierrez Br. 37-39; Sawyers Br. 17-19, 24-36) both seek to minimize the effect of the change from the text of former Section 212(c) to the text of current Section 1229b(a), but their efforts are unavailing.

a. Focusing on Section 1229b(a)(2)'s requirement that the alien have "continuously resided" in the United States for seven years after having been admitted by immigration authorities, Sawyers argues (Br. 36) that the new requirement is essentially synonymous with former Section 212(c)'s requirement of "lawful unrelinquished domicile." That is incorrect.

i. While the appellate decisions on which respondents rely interpreted the undefined term "domicile" in accordance with the common-law rule that a child's domicile follows that of his parents, no decision establishes that admission and years of residence following admission of the applicant's parent constitute compliance with those requirements by the applicant himself. And indeed, even the rationale underlying the common-law domicile rule—that "minors are legally incapable of forming the requisite intent to establish a domicile," *Holyfield*, 490 U.S. at 48—has no relevance for purposes of Section 1229b(a)(2). In contrast to the undefined term "domicile," neither the term "admitted" nor the term "residence" invites any consideration of the alien's

intent. "Admission" is the conferral of an authorization by immigration officials; it cannot be achieved unilaterally by the actions and intent of the alien, as domicile might. See 8 U.S.C. 1101(a)(13)(A) (defining the terms "admission" and "admitted"). And "residence" is defined as a person's "principal, actual dwelling place in fact, *without regard to intent.*" 8 U.S.C. 1101(a)(33) (emphasis added); see Gov't Br. 17, 28-29.

ii. Sawyers asserts that the term "resided continuously" (unlike the unadorned "resided") is a "term of art" that "has always been understood to include an intent component." Br. 25 (emphasis omitted). "If intent (and a child's inability to formulate it) is the linchpin of imputation," Sawyers reasons, "Section 212(c) and Section 1229b(a)(2) are in the relevant sense identical." *Ibid.* That, too, is incorrect.

As support for his claim that "resided continuously" is a term of art distinct from the defined term "resided," Sawyers cites *In re A-*, 4 I. & N. Dec. 723 (B.I.A. 1952), a Board decision interpreting a 1936 statute that predated the INA's definition of "residence" as being determined "without regard to intent." See Sawyers Br. 26; *id.* at 31 (noting that the current definition of "residence" was enacted as part of the INA in 1952); see also *id.* at 27 n.16 (discussing a 1943 Board decision). Sawyers cites no situations in which the Board has, since 1952, considered "resided continuously" to be a term of art that (unlike "resided") incorporates considerations of intent.[1]

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[1] Sawyers cites (Br. 27-28) the Board's decision in *In re Huang*, 19 I. & N. Dec. 749 (1988), the Ninth Circuit's decision in *Singh* v. *Reno*, 113 F.3d 1512 (1997), and the Regional Commissioner's decision in *In re Ng*, 12 I. & N. Dec. 411 (1967). None of those cases considered the meaning of the term "resided continuously."

In any event, the intent relevant to the discussion of the term "resided continuously" in *In re A-* was not intent to remain in a certain place from a given time forward, as under the law of domicile. It rather concerned the effect of subsequent temporary absences: such absences would not "operate to interrupt the continuity of residence" if "unaccompanied by an intent to abandon residence in the United States." *In re A-*, 4 I. & N. Dec. at 725. The relevant intent thus related not to whether an alien "resided" in a particular place but to whether the alien's residence in that place was "continuous." Thus, while a parent's intent to abandon residence in the United States could be imputed to a minor alien who left the country with the parent, see Gov't Br. 38-39, it does not follow that the parent's intent would similarly be relevant in determining whether the alien has established actual residence in the United States in the first place.[2]

iii. Sawyers also argues (Br. 33-36) that even if Section 1229b(a)(2) forbids any consideration of the alien's

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[2] Contrary to Sawyers's implication (Br. 29-30), this Court in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), did not "equat[e] 'maintenance of a domicile' * * * with 'continuous residence' " except insofar as it observed that both concepts, unlike the concept of "continuous physical presence," accommodate temporary absences from the United States. *Id.* at 191. That observation has no relevance here.

Sawyers's reliance (Br. 30-31) on the legalization provision, 8 U.S.C. 1255a, is also misplaced. There is no indication that Section 1255a's reference to the alien's continuing intention to adjust to LPR status, see 8 U.S.C. 1255a(b)(1)(B)(ii) and (3)(A), has any significance outside the context of that provision. Moreover, the provision does not purport to define the term "resided continuously," instead authorizing the Attorney General to promulgate regulations. 8 U.S.C. 1255a(g). By their terms, the regulations do not incorporate considerations of the alien's intent. See 8 C.F.R. 245a.1(c).

intent, the courts that permitted imputation of domicile under former Section 212(c) were also necessarily imputing residence as an element of domicile. As the authorities discussed in *Holyfield* make clear, the common-law rule that a child's domicile follows that of his parent means that his domicile may be in a location in which he does not in fact reside. See 490 U.S. at 48; see also, *e.g.*, *Yarborough* v. *Yarborough*, 290 U.S. 202, 211 (1933). But even among the few courts of appeals to address the imputation issue, there was no settled consensus as to whether imputation was permissible when the child did not reside in the United States. While the Second Circuit, for example, held that imputation was permissible under those circumstances, see *Rosario*, 962 F.2d at 225, the Ninth Circuit had no occasion to decide the issue because the alien in *Lepe-Guitron* had arrived in the United States at the same time as his parents and remained in the country after that time, see 16 F.3d at 1025. *Lepe-Guitron* did acknowledge the result in *Rosario* with apparent approval, see *id.* at 1026, but in subsequent cases the Ninth Circuit has described *Lepe-Guitron* as limited to unemancipated minors "residing with [their] parents" in the United States. *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1023-1024 (2005); see also *Barrios* v. *Holder*, 581 F.3d 849, 865 (2009).

iv. Residence in the United States alone does not, of course, satisfy Section 1229b(a)(2); the required seven years of continuous residence must follow admission of the alien by immigration authorities. Respondents fail to establish any settled understanding that would permit the requirement that the alien himself have been admitted under the INA to be satisfied by the admission of *someone else*, including the alien's parent. As the government has previously explained, the Ninth Circuit in

Lepe-Guitron had no occasion to consider the issue. See Gov't Br. 37-38. And as the Ninth Circuit emphasized in that case, the alien there seeking relief had entered the United States legally with his parents. 16 F.3d at 1024.[3]

b. With respect to Section 1229b(a)(1)'s separate five-year requirement for LPR status, respondents fail to identify any plausible textual hook for imputation. Martinez Gutierrez argues in passing (Br. 38) that Section 1229b(a)(1)'s reference to "permanent residence" should be understood as inviting the same sort of inquiry into intent as "domicile." But the statute refers to "an alien lawfully admitted for permanent residence," 8 U.S.C. 1229b(a)(1), not "permanent residence" alone. Unlike "resided continuously," the phrase "lawfully admitted for permanent residence" *is* a statutory term of art: "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The statutory definition of the term thus makes clear that it is a legal status formally conferred by the government; the alien's (or his parent's) unilateral conduct or intent are irrelevant, and the statutory definition accordingly makes no reference to intent.

Any contention that the Congress that enacted Section 1229b(a)(1) intended to endorse imputation of LPR status is particularly untenable. The court of appeals

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[3] Under Ninth Circuit precedent, an *adult's* period of lawful unrelinquished domicile could not begin until she obtained LPR status, rather than on the day she was admitted by immigration authorities. 16 F.3d at 1025; see *id.* at 1024. The court in *Lepe-Guitron* rejected that interpretation with respect to minors. *Id.* at 1025; see *id.* at 1026 n.12 (stating that only adults must be LPRs to accrue years of lawful unrelinquished domicile); Gov't Br. 37-38.

decisions on which respondents rely all made clear that LPR status was a threshold requirement "separate and independent" of the seven-year domicile requirement, and each court accordingly required that the alien child be an LPR in his own right in order to be eligible for Section 212(c) relief. *Rosario*, 962 F.2d at 223; see *id.* at 221; *Lepe-Guitron*, 16 F.3d at 1022-1023, 1026 n.12; see also *Morel*, 90 F.3d at 835, 839.[4] In Section 1229b(a)(1), Congress preserved that threshold requirement, but added a durational requirement to it: that the alien have had his LPR status for at least five years. In the absence of any precedent for imputing LPR status, Martinez Gutierrez cannot plausibly allege the existence of a settled understanding on the subject that Congress might be thought to have ratified.

3. Respondents identify no other authority establishing a settled understanding about imputing a parent's years of LPR status or residence after admission

Respondents' other efforts to establish that imputation is a "pervasive and well-settled" feature of the law, Sawyers Br. 16, are similarly unavailing.

Respondents note, for example (Martinez Gutierrez Br. 22-23; Sawyers Br. 15-16, 40-41), that the BIA has imputed a parent's actual or constructive knowledge to a child in considering whether the child is eligible for relief under 8 U.S.C. 1182(k), which permits the Attor-

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[4] Martinez Gutierrez's assertion (Br. 23) that "no court has viewed [the phrase 'lawfully admitted for permanent residence'] as foreclosing the imputation under former Section 212(c)" is correct only insofar as he means to suggest that no court read that phrase as forbidding an alien child who was an LPR in his own right from relying on imputation to satisfy the separate eligibility condition of seven years of lawful unrelinquished domicile.

ney General to waive inadmissibility if he concludes that "inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure." See *Senica* v. *INS*, 16 F.3d 1013, 1014-1015 & n.2 (9th Cir. 1994). They also note (Martinez Gutierrez Br. 53-54; Sawyers Br. 27-28) that imputation has been permitted in the context of determining whether an alien has *abandoned* LPR status, an inquiry that implicates considerations of the alien's intent. See, *e.g.*, *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988). Section 1229b(a), by contrast, does not refer to the alien's knowledge or otherwise implicate the alien's state of mind. It refers to a legal status that every individual alien must have been granted by the government in his own right. There is no general background proposition that such a legal status may be imputed from parent to child.

Respondents also rely (Martinez Gutierrez Br. 52; Sawyers Br. 39-40) on cases discussing firm resettlement, but they fail to establish the existence of any settled imputation rule. The administrative decision they cite, which was issued by the Regional Commissioner of the former Immigration and Naturalization Service rather than the Board itself, considered the actions of the minor applicant for refugee classification; the extent to which the decision rested on "imput[ation]" is unclear. *In re Ng*, 12 I. & N. Dec. 411, 412 (1967). And as the Ninth Circuit noted in *Vang* v. *INS*, 146 F.3d 1114 (1998), the BIA in that case had "applied the firm resettlement factors directly to [the minor] rather than to his parents," *id.* at 1117, although the Ninth Circuit affirmed the Board's decision based on consideration of the parents' resettlement, *ibid.*

In any event, isolated examples of cases in which certain forms of imputation have been allowed under unrelated immigration-law provisions provide no support for the proposition that Section 1229b(a) allows imputation to satisfy its distinct requirements.[5]

C. Respondents' Policy Arguments Do Not Permit An Interpretation At Odds With The Statutory Language

Respondents repeatedly assert (Martinez Gutierrez Br. 15, 18, 40-42, 44-48; Sawyers Br. 20-22, 42-45) that Congress could not have intended to forbid imputation under Section 1229b(a) because imputation is consistent with general policy goals of the INA and Section 1229b(a). Respondents' policy arguments cannot override the plain text of Section 1229b(a).

1. As explained in the government's opening brief (at 24-27), the limited legislative history that exists contains no indication that the Congress that enacted Section 1229b(a) even considered the possibility, much less affirmatively intended, that an alien seeking cancellation would be able to rely on someone else's period of LPR status, admission by immigration authorities, or residence after admission. Sawyers argues, however, that Congress could not have intended to preclude imputation, given what he asserts was Congress's intent to

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[5] Respondents likewise fail to establish any general rule that permits courts to impute the conduct of one person or entity to another whenever imputation would "vindicate statutory purposes." Martinez Gutierrez Br. 24. Certainly neither the "responsible corporate officer" doctrine articulated in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), nor cases affirming the place of common-law vicarious or agency liability principles in certain statutory schemes, *e.g.*, *American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 567 (1982), stand for any such principle.

"liberalize[] the relief-from-removal rule in other respects." Br. 10; see *id.* at 20-21.

Sawyers's characterization of Section 1229b(a) is incomplete. The legislative history indicates that the Congress that enacted Section 1229b(a) had a number of goals, including resolving a conflict among the circuits about whether the seven years of "lawful unrelinquished domicile" required for relief under former Section 212(c) had to follow the granting of LPR status to the alien or whether the alien could count years in some other lawful status. See Gov't Br. 24-27. In those circuits that had adopted the former rule, Section 1229b(a) did "liberalize" the availability of relief by reducing the required number of years in LPR status from seven to five. But in those circuits that had adopted the latter rule, Section 1229b(a)(1)'s five-year LPR status requirement rendered the statute more, rather than less, stringent than its predecessor.

Other provisions of Section 1229b(a) make clear that Congress did not enact the statute with the purpose of categorically expanding the availability of relief. As Sawyers acknowledges (Br. 20 n.11), Section 1229b(a) limited the availability of relief from removal by adding a new "stop-time" rule designed to ensure that aliens would not accrue time toward eligibility for relief after commission of a specified crime or by delaying their immigration proceedings. See 8 U.S.C. 1229b(a)(3), 1229b(d)(1); Gov't Br. 24-25. It also carried forward a set of new restrictions for aliens convicted of certain crimes. See *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001) (describing 1990 and 1996 predecessors to Section 1229b(a)(3)). There is thus no reason to believe, based on supposed "liberalizing" effects of Section 1229b(a), that Congress would have wanted courts to recognize an

exception to Section 1229b(a)'s requirements that appears nowhere in the statute's text.

2. Respondents' argument that imputation "serves the dual purpose of promoting family unity and protecting individuals who have strong ties to the United States" (Martinez Gutierrez Br. 1), does not establish that Congress must have intended imputation to be available under Section 1229b(a)(1) and (2).

As an initial matter, respondents do not dispute that the aliens who would seek to invoke the Ninth Circuit's imputation rule are not typically unempancipated minors seeking to reunite or remain with their parents in the United States. They are, rather, adults who—like respondents themselves—seek to avoid removal after committing removable offenses.

In any event, although the goals respondents identify undoubtedly underlie a number of provisions of immigration law, Congress has not single-mindedly pursued those goals without regard to competing objectives. See Gov't Br. 30-33. Virtually any limitation on eligibility for cancellation of removal will have the effect of barring relief for some individuals who may have family or other ties in the United States. But while an alien's family ties and the strength of his ties to the United States are taken into account in deciding whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discretion, *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998), they cannot serve to make an alien eligible in the first place if he has not fulfilled the statutory requirements.

3. Martinez Gutierrez argues (Br. 19) that imputation is particularly warranted in cases like his because "he was unquestionably eligible for lawful permanent residence from the time his father sought it on his be-

half," and his "delay" in obtaining LPR status was "a product solely of the systemic operation of quotas and the delays inherent in bureaucratic processing of applications." See also *id.* at 42 (stating that "the delay was solely a result of the visa backlog" for children of LPRs).

As a legal matter, Martinez Gutierrez was not in fact eligible for LPR status from the time his father submitted the application, because no visa was immediately available to him. 8 U.S.C. 1255(i)(2)(B). Nor, as a general matter, is the decision whether to grant an application for adjustment to LPR status a mere formality or ministerial act. The rule Martinez Gutierrez asks this Court to adopt would effectively short-circuit the statutory scheme, allowing an alien to benefit from his parent's LPR status even if the alien at the time had not satisfied or could not satisfy the eligibility requirements. See *In re Escobar*, 24 I. & N. Dec. 231, 234-235 (B.I.A. 2007).

It is true, as the government has previously explained, that there has for decades been a backlog for visas allocated to spouses and minor children of certain LPRs. Gov't Br. 31-32. But despite its awareness of that backlog, the Congress did not take action to eliminate or reduce it. *Id.* at 32 & n.11. Furthermore, Congress drafted Section 1229b(a) in a manner that expressly turns on the length of time the alien actually had the status of an LPR after having been formally accorded that status by the government, without regard to whether an alien's adjustment application could have been granted earlier if there had been no visa backlog or other impediment. There is no reason to believe that Congress intended to authorize courts to craft an extra-textual imputation rule to override that requirement or to excuse the alien's non-compliance because of limita-

tions on the availability of visas that are established features of the statutory scheme and experience under it.

4. Respondents' policy arguments ultimately boil down to the proposition that Congress could not have meant what it said when it enacted Section 1229b(a)(1) and (2), and that it could not have intended to do what it did when it eliminated statutory language that some courts had previously interpreted to permit imputation of compliance with one feature of the former Section 212(c). The best evidence of Congress's intent is, however, the text of the statute Congress enacted. In Section 1229b(a), Congress "struck the balance it thought right"; "the judicial role is to enforce that congressionally determined balance." *Milner* v. *Department of the Navy*, 131 S. Ct. 1259, 1265 n.5 (2011).

D. The Board's Reasonable Interpretation Of The Statute Is Entitled To Deference

Section 1229b(a) unambiguously requires that, to be eligible for relief, an alien must in fact have spent no less than five years in the status of an LPR, and no less than seven years residing in the United States following his own admission by immigration authorities. But should the Court conclude that the statute is ambiguous about whether an alien who does not meet the durational requirements is entitled to rely on a parent's years as an LPR or residence after admission, the BIA's interpretation is at a minimum reasonable and entitled to *Chevron* deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. Respondents do not contend (nor could they) that the Board's interpretation of Section 1229b(a), as set out in its published decisions, is inconsistent with the text of

the statute. Rather, they assert that the Board's interpretation is not entitled to deference because it does not reflect the Board's expertise or exercise of discretion, but instead the Board's belief that its interpretation "was mandated by the plain language of the statute." Martinez Gutierrez Br. 29; see also Sawyers Br. 38-39.

Contrary to respondents' characterization, the Board decisions at issue did not stop at step one of the *Chevron* analysis. The Board's analysis departed from the Ninth Circuit's premise that Section 1229b(a) is "silent on the issue of imputing lawful permanent residence." *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (2008) (citing *Cuevas-Gaspar*, 430 F.3d at 1022). Relying on *Chevron* and *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), the Board took the position that, despite the Ninth Circuit's contrary precedent, the court was bound to defer to the Board's interpretation at *Chevron* step two. See *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601.

Moreover, the Board's analysis did not rest solely on its reading of the "clear language of the statute." *Escobar*, 24 I. & N. Dec. at 235. The Board also explained that "there is no logical or legal basis to consider the residence of a minor alien's parents in determining whether the minor acquired the necessary years of residence," *id.* at 233; that imputing LPR status from a parent to a child is inconsistent with Board precedent governing adjustment to LPR status, *id.* at 234; that imputation of LPR status is not compelled by Board precedent concerning imputation of the abandonment of LPR status, *id.* at 234 n.4; and that imputation of LPR status would create significant holes in the administration of the statutory scheme, *id.* at 234 n.5. The Board's inter-

pretation was, in short, rooted in the Board's unique authority and expertise.[6]

2. Respondents also claim (Martinez Gutierrez Br. 54; Sawyers Br. 39-42) that the Board is not entitled to *Chevron* deference because the Board's treatment of imputation has been "inconsistent." This argument too lacks merit. Critically, respondents do not dispute that the Board has consistently rejected imputation under Section 1229b(a). And although the Board has imputed a parent's *state of mind* for purposes of evaluating a child's abandonment of LPR status and actual or constructive knowledge of admissibility, it has not imputed a parent's years of LPR status or residence following admission to the parent's minor children. See Gov't Br. 38-39.

Sawyers insists (Br. 39-40) that the firm resettlement cases demonstrate that the Board has imputed "objective conduct," and not just state of mind, from a parent to a child. But as noted above, see pp. 13, *supra*, the Regional Commissioner's decision in *Ng* evaluated the alien child's own "objective conduct," and the extent to which it relied on imputation principles is unclear. But even had the Board itself taken a different approach to imputation in other contexts, that does not mean it was required to allow imputation in the distinct context of Section 1229b(a). And in any event, as "the agency adequately explain[ed] the reasons for" its interpretation of these particular statutory provisions, any purported inconsistency with prior decisions "is not invali-

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[6] Even if this Court were to determine that the Board's analysis was limited by an erroneous belief that its interpretation was compelled by the statutory text, the "proper course" would be to remand to the Board "for additional investigation or explanation." *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (citation omitted).

dating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Brand X*, 545 U.S. at 981 (internal quotation marks and citation omitted).

3. Contrary to respondents' argument (Sawyers Br. 37-38; see also Martinez Gutierrez Br. 54), the BIA's interpretation should not be disregarded on the view that Section 1229b(a) should be construed in favor of the alien. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Even application of the rule of lenity in criminal cases requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). No such ambiguity is present in this case: Section 1229b(a) plainly requires that an alien actually have been an LPR for at least five years and have continuously resided in the United States for at least seven years after admission.

Moreover, the INA expressly confers on the Attorney General the authority to resolve ambiguities in the first instance. See 8 U.S.C. 1103(a)(1) and (g); *Aguirre-Aguirre*, 526 U.S. at 424-425. If courts were required to resolve any and all ambiguities in the alien's favor, that would wholly usurp the Attorney General's interpretive authority. A court thus properly considers whether statutory ambiguities should be resolved in favor of the alien only after the court has used every interpretive tool at its disposal, including application of deference principles under *Chevron*. Cf. *Negusie* v. *Holder*, 555 U.S. 511, 518 (2009) (the "rule of lenity" may be relevant in reviewing agency action for reasonableness, but does

not establish that a statute is unambiguous such that deference is unwarranted). Because the statute's text, history, and authoritative interpretation by the Board all provide a complete answer to the questions presented, principles of liberal construction have no application.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL
Petitioner,

v.

CARLOS MARTINEZ GUTIERREZ,
Respondent.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
Petitioner,

v.

DAMIEN ANTONIO SAWYERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL IMMIGRATION JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Heartland Alliance's **National Immigrant Justice Center** (NIJC) is a non-profit organization headquartered in Chicago, Illinois. NIJC has been accredited by the Board of Immigration Appeals ("BIA") since 1980. NIJC provides education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2010, though its staff attorneys and its network of over 1000 *pro bono* attorneys, NIJC provided legal services to more than 10,000 non-citizens.

NIJC promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. NIJC has a deep interest in the fairness of the BIA review process, as well as in protecting the opportunity of noncitizens like the Petitioners to seek discretionary relief from removal.

SUMMARY OF THE ARGUMENT

Lurking below the prominently argued questions of statutory interpretation in this case are complicated questions of how deference to the Board of Immigration Appeals ("Board") ought to function.

The Ninth Circuit analyzed the question below under the familiar *Chevron* test, as elaborated on by this Court's decision in *National Cable & Telecommunications Associations* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842–43 (1984). However,

this aspect of the lower court's approach was erroneous. The published Board decisions which the lower court analyzed under *Chevron* engaged in a straightforward "plain language" analysis of § 1229b(a) (1) and (2). Under this Court's decision in *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009), agency decisions are not entitled to *Chevron* deference where they erroneously reach a plain meaning statutory interpretation and a court finds the statutory text ambiguous. The Board has not purported to choose one interpretation over other plausible choices; indeed, the Board's previous case law provides some reason to believe that it might adopt the imputation rule urged by Respondents. As the BIA offered no rationale for the result other than a plain language reading, the Court's case law calls for remand if the Court finds the statutory provisions ambiguous.

If the Court were to find that the Board's precedential decision-making qualified for *Chevron* deference, it would then confront a novel circumstance of an administrative law court purporting to overturn an Article III court under the authority of *Brand X*. *Amicus* submits that *Brand X* is particularly problematic as to administrative law bodies such as the Board. While *Brand X* deference always entails some separation of powers questions, those tensions are heightened in the immigration context, where the executive has a role distinct from the legislative, and where the Constitution places immigration matters squarely in the hands of Congress. Worse, the institutional integrity of the federal court system is implicated when the power to overrule Article III courts is given to administrative law judges. Amicus would urge against *Brand X* deference for agencies such as the Board.

To the extent that the Court concludes that *Brand X* necessarily follows from *Chevron* deference to the Board, the Court should revisit whether *Chevron* deference is appropriate as to the Board of Immigration Appeals in the first place. The Board occupies an unusual role within the administrative law world. It does not operate openly; it maintains no public docket, rarely invites outside participation before issuing precedential decisions, and does not even make its rare oral arguments publicly known. It operates in a dual-enforcement context wherein it possesses no rulemaking authority of its own, does not itself enforce the immigration laws, and possesses no authority to overrule regulations promulgated by other related agencies. It suffers from a lack of resources which has led to a slew of poorly reasoned published and unpublished decisions. It decides nearly 40,000 cases per year, selecting approximately 0.1% of those cases for publication. Its criteria for publication are not publicly revealed. It is often called upon to interpret provisions of the Immigration and Nationality Act which the federal courts are simultaneously forced to interpret in the criminal context. If the Court were to revisit the propriety of the appropriate style of deference to the Board, Amicus submits that the *Chevron* framework would be inappropriate.

ARGUMENT

I. SHOULD THE COURT FIND THE STATUTORY LANGUAGE AMBIGUOUS, A REMAND IS NECESSARY BECAUSE BIA HAS NOT SET FORTH A RATIONALE THAT WOULD INVOKE DEFERENCE

The parties urge that the statutes in question have a plain meaning under "step one" of *Chevron U.S.A.*

Inc. v. *NRDC*, 467 U.S. 837, 842–43 (1984), after application of traditional canons of construction. Cf. Br. for Pet'r, 33; Br. for Resp't, 37 (10-1543). The Board of Immigration Appeals also ruled on plain meaning grounds. When the Board found that a parent's period of residence cannot be imputed to a child for the purpose of satisfying the eligibility requirements contained in 8 U.S.C. § 1229b(a)(1) and (2), it did so based on the "clear language of the statute" and the "clear intent of Congress." *In re Escobar*, 24 I. & N. Dec. 231, 234 (2007) (interpreting § 1229b(a)(1)); see also *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (BIA 2008) (relying on *Escobar* and interpreting § 1229b(a)(2)). The Board believed its interpretation was compelled by the statute's plain meaning, and conducted a typical step one analysis. See, *e.g.*, *In re Martinez*, 25 I. & N. Dec. 66, 74-75 (BIA 2009) ("In ascertaining the plain meaning of a statute, we consider the particular statutory language at issue, its context, and the language and design of the statute as a whole."

If the Court reaches the question of deference under *Chevron*, it will have already determined that the statute is ambiguous—that it lacks a plain meaning. See *Chevron*, 467 U.S. at 842–43 (instructing courts to defer to reasonable agency interpretations only when the intent of Congress is not clear or unambiguous). Thus, in order for the Court to reach the second "step" of *Chevron*, it must implicitly recognize that the stated basis for the Board's ruling in *Ramirez-Vargas* was erroneous.

It is no answer to say that the Board's "refusal" to read imputation into the statute would have been reasonable under *Chevron* if the Board *had* attempted to construe an ambiguous statute. Cf. Br. or Pet'r at 34. The Board did not simply decline to

exercise its discretion to read imputation into the statute; instead, the Board believed it lacked such discretion in the first instance.

Even if the Board's interpretation would have been permissible had it found the statute to be ambiguous, it is a "simple but fundamental rule of administrative law" that courts can "judge the propriety" of agency action "solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Application of this administrative law rule is particularly sensible here, where the Board's case law gives some reason to believe that the agency might permit imputation from parent to child if it believed that the statutory text could support that approach. See, *e.g.*, *In re Ng*, 12 I. & N. Dec. 411, 412 (BIA 1967); *In re A.*, 4 I. & N. Dec. 723, 725 (BIA 1952); cf. *In re Aurelio*, 19 I. & N. Dec. 458 (BIA 1987) (imputing intent of parents to child).

Amicus understands the Court to have adopted a rule that "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Peter Pan Bus Lines, Inc.* v. *Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (citations and internal quotation marks omitted). In *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009), the Court quoted with approval the holding in *Cajun Elec. Power Coop., Inc.* v. *F.E.R.C.*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (opinion by Silberman, J., joined by R. Ginsburg and Thomas, JJ.), that "if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see." The *Negusie* Court quoted that language for the proposition that deciding a matter unaddressed by

the Board of Immigration Appeals would be "in tension with" the ordinary remand rule. 555 U.S. at 523. As that proposition was the basis for the Court's decision, cf *id.* at 534 n.5 (Stevens, J., concurring in part and dissenting in part), it constitutes part of the holding of that case.

Thus, to the extent that the Court finds it necessary to reach step two of *Chevron*, *Negusie* requires application of the "ordinary remand rule" so that to the Board may exercise its discretion in the first instance. 555 U.S. at 523 ("Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." (citations and internal quotation marks omitted)); see also *INS* v. *Orlando Ventura*, 537 U.S. 12, 17 (2002) (*per curiam*) (explaining that the ordinary remand rule applies where an agency "can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides").

If the Court finds the statutory texts at issue herein to lack a plain meaning, the Court would then confront the issue of the Board's authority under Brand X. While the Court need not resolve the question today, it will likely arise on remand, and the Court may find it prudent to provide some guidance to the lower courts on this point.

II. THE COURT OUGHT TO HESITATE BEFORE APPLYING *BRAND X* TO THE BOARD OF IMMIGRATION APPEALS

The Court's decision in *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005), appears to permit agencies to overturn or reject statutory interpretations adopted by the federal courts, when the agencies issue decisions which carry the force of law. *See id.* at 1017 (Scalia, dissenting). Indeed, the Board has so interpreted *Brand X*, having cited it in dozens of cases, and employed it in published[1] and unpublished cases[2] to reject federal court decisions in cases arising within those circuits.

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[1] *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008) (rejecting *Lin* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) within the Ninth Circuit); *In re Silva-Trevino*, 24 I. & N. Dec. 687 (BIA 2008) (overturning 50 decades of BIA jurisprudence and case law of ten circuits); *In re Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010) (rejecting *Acosta* v. *Gonzales*, 439 F.3d 550 (9th Cir. 2006) within Ninth Circuit); *In re Guevara Alfaro*, 25 I. & N. Dec. 417 (BIA 2011) (rejecting *Quintero-Salazar* v. *Keisler*, 506 F.3d 688 (9th Cir. 2007) under authority of *Silva-Trevino*, notwithstanding intervening circuit authority from Eighth and Third Circuits rejecting the analysis in that decision); *In re Saiful Islam*, 25 I. & N. Dec. 637 (BIA 2011) (refusing to apply *Nason* v. *INS*, 394 F.2d 223 (2d Cir. 1968) within the Second Circuit).

[2] *See In re Benito Estrada*, File: A092 408 863, 2008 WL 5025206 (BIA Oct. 27, 2008) (unpublished) (rejecting *Lin* v. *Gonzales*, *supra*, within Ninth Circuit); *In re Juan Manuel Alvarez-Briseno*, File: A021 611 209, 2009 WL 773178 (BIA Feb. 27, 2009) (unpublished) (same); *In re Jesus Haro-Perez a.k.a. Jesus Jose Harro*, File: A092 515 273, 2009 WL 2171613 (BIA July 9, 2009) (unpublished) (same); *In re Ruben Dario Sanchez Esquivel a.k.a. Ruben Dario Sanchez-Equivel a.k.a. Ruben Dario*, File: A035 727 884, 2009 WL 3250485 (BIA Sept. 18, 2009) (unpublished) (same); *In re Gilberto Salgado-Valenzuela*,

Further, the agency has openly adopted a policy of employing *Brand X* widely, in order to assert executive authority:

> The Supreme Court's decision in Brand X Internet offers **an important opportunity** for the Attorney General and the Board to be able to reclaim Chevron deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations.

Board of Immigration Appeals: *Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*, 73 Fed. Reg. 34,654, 34,661 (June 18, 2008) (emphasis added) (cited with approval in *In re R-A-*, 24 I. & N. Dec. 629 (BIA 2008).

File: A041 392 297, 2009 WL 4030445 (BIA Nov. 10, 2009) (unpublished) (same); *In re: Aik Wong a.k.a. Bingqin Wang*, File: A098 270 087, 2010 WL 3027539 (BIA July 2, 2010) (unpublished) (same, notwithstanding intervening decision in *Coyt* v. *Holder*, 593 F.3d 902 (9th Cir. 2010), which the Board found inapplicable); *In re Oscar Padilla*, File: A073 868 045, 2008 WL 5477687 (BIA Dec. 8, 2008) (unpublished) (rejecting *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005) within Ninth Circuit); *In re Karina J. Alvarez-Fernandez a.k.a. Karina J. Alvarez*, File: A046 941 394, 2009 WL 638928 (BIA Feb. 24, 2009) (unpublished) (applying *Silva-Trevino* within 11th Cir.); *In re Agustin Gandai Ajavon*, File: A028 202 026, 2009 WL 1799957 (BIA May 29, 2009) (unpublished) (applying *Silva-Trevino* within Third Circuit, notwithstanding *Mehboob* v. *Att'y Gen.*, 549 F.3d 272 (3d Cir. 2008)); *In re Jorge Alberto Mora-Saucedo a.k.a. George Albert Saucedo a.k.a. Georget A. Saucedo a.k.a. George Alberto Mora-Saucedo*, File: A305 933 369, 2010 WL 1607035 (BIA March 29, 2010) (unpublished) (applying *Silva-Trevino* within Ninth Circuit notwithstanding *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 910 (9th Cir. 2009)).

The unpublished Board decision in *Sawyers*, below, File: A44 852 478, 2007 WL 4711443 (BIA Dec. 26, 2007), appears to be the first decision in which Board employed *Brand X* to reject a federal court decision for a case arising within that circuit.

The impact of this new, muscular policy has been significant. When the Board rejects heretofore binding circuit authority, it leads to increased federal court litigation. For instance, in *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008), the Board declined to apply *Lin* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) within the Ninth Circuit. The Board's interpretation of its regulations was rejected in court after court,[3] but the developing weight of contrary authority left the Board unconvinced.[4] The Ninth Circuit ultimately rejected the Board's position again, *Reyes–Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011), but not before the Board had disclaimed authority to reopen proceedings in numerous unpublished decisions.[5] The Westlaw database is not

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[3] *William* v. *Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007); *Marin–Rodriguez* v. *Holder*, 612 F.3d 591, 594–95 (7th Cir. 2010); *Coyt*, 593 F.3d 902; *Pruidze* v. *Holder*, 632 F.3d 234, 237–38 (6th Cir. 2011); *Luna* v. *Holder*, 637 F.3d 85 (2d Cir. 2011); *Reyes–Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Prestol Espinal* v. *Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011).

[4] *See In re: Aik Wong a.k.a. Bingqin Wang*, 2010 WL 3027539 (unpublished) (finding the Ninth Circuit's intervening authority in *Coyt*, 593 F.3d 902 to be distinguishable).

[5] *See In re Benito Estrada*, 2008 WL 5025206 (unpublished); *In re Juan Manuel Alvarez-Briseno*, 2009 WL 773178 (unpublished) (same); *In re Jesus Haro-Perez a.k.a. Jesus Jose Harro*, 2009 WL 2171613 (unpublished) (same); *In re Ruben Dario Sanchez Esquivel a.k.a. Ruben Dario Sanchez-Equivel a.k.a. Ruben Dario*, 2009 WL 3250485 (unpublished) (same); *In re Gilberto Salgado-Valenzuela*, 2009 WL 4030445

a comprehensive list of Board decisions; and it is unknown how many people were prejudiced by the Board's approach. Many noncitizens are financially unable to engage in the appellate litigation which would be necessary to vindicate the precedent of the court of appeals.

The point is not that the Board is invariably wrong when it disagrees with a Court of Appeals' interpretation; but that the Board's expansive view of *Brand X* has consequences for the federal court system. To take another example, in *Silva-Trevino*, the Attorney General overturned established case law in every circuit except for the Seventh Circuit. See *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008). Therefore, under *Brand X*, the Board applied *Silva-Trevino* within the Third Circuit, *see In re Agustin Gandai Ajavon*, 2009 WL 1799957 (unpublished), even after post-*Silva-Trevino* circuit precedent adhered to the categorical approach. *Mehboob* v. *Att'y Gen.*, 549 F.3d 272 (3d Cir. 2008). The Board's stance required the Third Circuit to re-re-affirm its adherence to the categorical test for ascertaining moral turpitude. *Jean–Louis* v. *Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009); accord, *Guardado–Garcia* v. *Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (adhering to categorical test); *Fajardo* v. *U.S. Atty. Gen.*, 659 F.3d 1303, 1310-11 (11th Cir. 2011) (same, finding *Silva-Trevino* contrary to Congressional intent). It is the nature of *Brand X* in this context to lead to re-litigation of issues seemingly resolved at the Court of Appeals level.

The Board basically shares Justice Scalia's understanding of *Brand X* that "[e]ven when the

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(unpublished) (same); *In re Aik Wong a.k.a. Bingqin Wang*, 2010 WL 3027539 (unpublished).

agency itself is party to the case in which [a] Court construes a statute, the agency will be able to disregard that construction and seek Chevron deference for its contrary construction the next time around." *Brand X*, 545 U.S. at 1017.

Aside from the constitutional issues noted in the *Brand X* dissent, *see id.* (citing *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948)), the approach has particular significance in the immigration context. The constitution gives Congress a leading role in regulating immigration within the United States, U.S. Const. art. I, § 8, cl. 4, see, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 69-70 (1941), but immigration may also implicate national sovereignty, international relations, and defense powers. See, *e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (citing *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893). Permitting executive agencies power to reject the "best interpretation" *Brand X*, 545 U.S. at 983 (Scalia, J, dissenting), of a Congressional statute allows the executive to expand its authority at the expense of Congress. *Brand X* thus threatens the delicate balance between the Congress and the Executive as well as relations between the Judiciaru and the Executive.

At a practical level, application of *Brand X* in this context would allow administrative law judges to effectively overrule courts which have reversed them. The Court need not be blind to the odd psychology this would involve; surely no judge likes being reversed. See, *e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 77-78 (1994) (discussing reasons why district court judges dislike being reversed on appeal); Richard A. Posner, *The*

Problems of Jurisprudence 224 (1990) ("[M]ost judges are highly sensitive to being reversed"). As understood by the agency, *Brand X* permits an administrative law board whose decision has been reversed (as to an ambiguous statute) to overturn the reversal by the issuance of a new precedential decision. This creates at best an untoward appearance. Justice Scalia noted this in *Brand X*, see 545 U.S. at 1016-17 (Scalia, J., dissenting), but the administration action in that case was a highly technical administrative rulemaking, *id.* at 977-78, not in the context of administrative judicial bodies overruling Article III courts. Whatever the wisdom of *Brand X* in heartland areas of administrative action, it has a different mien applied to administrative law bodies.

Unless an agency actually undertakes to overrule a decision of this Court, the *Brand X* issue will be resistant to the Court's review. As in any agency case that comes before the Court, this Court is not bound by the lower court interpretation. *Id.* at 1019-20 (Scalia, dissenting). (This is presumably why the parties have declined to address the *Brand X* issue at any length.) In any agency case that comes to the Court, it will analyze the agency action under the *Chevron* test, and *Brand X* issues would become irrelevant by virtue of the grant of certiorari. The institutional significance of *Brand X* will persist; and this Court's legal interventions must necessarily remain infrequent in comparison to the larger federal docket.

Amicus sees three possibilities: (a) the agency's approach is correct, and the BIA may overrule Article III courts by issuing precedential decisions; (b) the decision in *Brand X* may be interpreted not to apply to quasi-judicial bodies like the BIA (or to the BIA

only, as *sui generis*); or (c) the Court may revisit whether to grant *Chevron* deference to the Board.

III. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER BIA'S ADJUDICATORY DECISIONS WARRANT *CHEVRON* DEFERENCE

The Board's peculiar administrative work does not fit any of the rationales that underlie *Chevron*'s strong deference to agency rulemaking and expertise. Should the Court find *Chevron* deference implicated by this case, *Amicus* urges the Court to rule that *Chevron* deference should not apply to BIA decisions. Given the poor fit between the Board's activities and *Chevron*'s reasoning, only so-called "*Skidmore* deference" should be accorded to the Board's juridical decisions. See *United States* v. *Mead Corp.*, 533 U.S. 218, 239 (2001) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944)).

A. The BIA Generally Makes Rules With No Input From the Public or From Stakeholders.

Unlike federal administrative agencies acting through public rulemaking, cf., *e.g.*, Dep't of Homeland Sec., Statement of Regulatory Priorities, 75 Fed. Reg. 79536-01, 2010 WL 5677733 (Dec. 20, 2010), the Board of Immigration Appeals maintains no public docket. Nothing on its website, or in any other publication, indicates any case or issue which is under consideration for potential publication of a precedential decision. Cf. Executive Office of Immigration Review, http://www.justice.gov/eoir (last visited Dec. 20, 2011).

Even oral argument at the Board is not announced publicly. Cf. Executive Office of Immigration Review, News and Information,

http://www.justice.gov/eoir/press/newsinfo.htm (last visited Dec. 20, 2011) (public statements by EOIR during 2010 and 2011, including no mention of oral argument in any case). Oral argument, at any rate, is quite rare. Since 2008, the Board appears to have scheduled oral argument in only four cases. *In re Bautista*, 25 I. & N. Dec. 616 (BIA 2011); *In re Ramon Roberto Huerta-Flores a.k.a. Roberto Huerta*, File: A092 444 014, 2010 WL 5808899 (BIA Aug. 27, 2010) (unpublished); *In re Castillo-Padilla*, 25 I. & N. Dec. 257 (BIA 2010); *In re Marcal Neto*, 25 I. & N. Dec. 169, 171 (BIA 2010) (argument cancelled due to inability of counsel to be present). During that four year period, the Board and Attorney General issued 141 precedential decisions, and the Board decided at least 104,976 cases. U.S. Dep't of Justice, FY10 Statistical Year Book, at S1 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf (numbers are for fiscal years 2008-2010, the last year for which statistics are available). That is, oral argument occurred in 2.1% of the published decisions and in less than .001% of unpublished decisions.

From 2008 to the present, *amicus curiae* have appeared in 11 of the Board's published decisions (less than 10%). Three of those cases involved the overruling of earlier BIA decisions which had been previously decided without amicus involvement,[6] perhaps suggesting the utility of public involvement. This level of amicus involvement is actually substantially higher than the historical norm. From

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[6] *In re Marcal Neto*, 25 I. & N. Dec. 169 (overruling *In re Perez Vargas*, 23 I. & N. Dec. 829 (BIA 2005)); *In re Garcia Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (overruling *In re Saysana*, 24 I. & N. Dec. 602 (BIA 2008)); *In re Alyajzi*, 25 I. & N. Dec. 397 (BIA 2011) (overruling in part *In re Shanu*, 23 I. & N. Dec. 754 (BIA 2005)).

2002-2006 (during which period 88 precedential decisions were issued), *amicus curiae* were involved in only three published decisions (3.4% of the total). *In re Assaad*, 23 I. & N. Dec. 553 (BIA 2003); *In re Smirko*, 23 I. & N. Dec. 836 (BIA 2005); *In re S-K-*, 23 I. & N. Dec. 936 (BIA 2006). Indeed, during that period, the Board issued as many published decisions in cases involving *pro se* noncitizens[7] as in cases involving *amicus curiae*. *In re Y-C-*, 23 I. & N. Dec. 286 (BIA 2003) (asylum application by unaccompanied minor); *In re Gomez-Gomez*, 23 I. & N. Dec. 522 (BIA 2002) (finding removability of 8 year old respondent established by clear and convincing evidence and remanding for *in absentia* removal order); *In re Mejia-Andino*, 23 I. & N. Dec. 533 (BIA 2002) (concerning propriety of service on minor respondent 7 years of age). In none of the *pro se* published cases – all involving minor respondents – did the Board solicit amicus briefing or appoint counsel.

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[7] In 2003, 48 percent of aliens were unrepresented in proceedings before Immigration Judges. Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook G1, fig. 9. (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. By 2006, that number had decreased to 35 percent; it rose again to 42 percent in 2007. *Id.* The percentage of aliens who were unrepresented in their proceedings before the BIA itself fluctuated between 25 percent in 2007 and 22 percent in 2008. *Id.*; Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook G1, fig. 9, W1, fig. 30 (2008), http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. Noncitizens before the BIA are not considered eligible for appointed counsel. *See In re Compean*, 24 I. & N. Dec. 710, 714 (BIA 2009), *rev'd*, 25 I & N. Dec. 1 (BIA 2009); *cf. Aguilera-Enriquez* v. *INS*, 516 F.2d 565, 570 (6th Cir. 1975) (finding appointed counsel required by Fifth Amendment in limited cases).

Indeed, even in counseled cases, the issues under consideration are often opaque. For instance, in *Silva-Trevino*, former Attorney General Mukasey certified a BIA decision to himself, and then issued a decision which overturned 50 years of BIA case law, as well as case law in nearly every circuit in the country. See *In re Velazquez-Herrera*, 24 I. & N. Dec. at 513 ("For nearly a century, the Federal circuit courts of appeals have held that ... the focus ... must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." (emphasis in original)). The attorney for Mr. Silva-Trevino was not even advised that the case had been certified to the Attorney General until months after the certification. Br. for Pet'r 4-5, *Silva-Trevino* v. *Holder* (5th Cir.) (11-60464) (on file with counsel) (record contains emails to Immigration Court certifying case in April 2007, but notice not sent to counsel until August 2007). Counsel for Silva-Trevino was not permitted to submit briefing, or even told of the issues being considered by the Attorney General. *Jean-Louis*, 582 F.3d at 471 n.11 ("the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. In fact, neither the IJ decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders, including immigrant and refugee advocacy organizations, the opportunity to register their views.").

Granted, *amicus* briefs are only one way for the public to be involved in a case, and are uncommon even at the Courts of Appeals. *Amicus* is not arguing here that agencies must issue statements to parties

or potential amici of issues under consideration. But without some means of permitting public input, such input cannot reasonably be expected. The result is that the precedent-setting rules of the Board and Attorney General are as far from traditional notice and comment rulemaking or public agency hearings as can be imagined. Cf. *Mead Corp.*, 533 U.S. at 230 ("fairness and deliberation ... should underlie a pronouncement [having the force of law]").

B. The BIA Has Comparatively Limited Subject Matter Expertise.

Although the subject matter jurisdiction of the BIA is limited,[8] its adjudicatory nature gives it little advantage over Article III courts, and the split enforcement structure also undercuts any claim for deference.

The DHS and BIA are distinct administrative bodies that implement immigration policy in a split-enforcement structure.[9] The BIA is located within the Department of Justice's Executive Office for Immigration Review (EOIR), where immigration judges adjudicate removal cases.[10] In this split-

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[8] *See* Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(b) (2009) (setting forth the limited nature of the BIA's subject matter jurisdiction).

[9] *See generally* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315, 317-319 (1987).

[10] Enforcement by the DHS and BIA differs slightly from typical split-enforcement agency structures because the Secretary of Homeland Security and the Chairman (or a majority of the Board) may refer cases to the Attorney General, or the Attorney General May direct the BIA to refer cases. 8 C.F.R. § 1003.1(h) (2007). *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja vu of*

enforcement structure, the DHS enforces and administers the law while the BIA adjudicates. This is not unique to immigration law. Cf., *e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678; Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 823; Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

The split enforcement structure militates against giving the Board full *Chevron* deference. In *Martin* v. *Occupational Safety & Health Rev. Comm'n*, (499 U.S. 144 (1991)), the Court held that in a split enforcement structure, the rulemaking enforcement agency had "readily identifiable structural advantages" over the adjudicatory agency. *Id.* at 152.[11] For instance, the Court found the enforcement agency better able to "reconstruct the purpose of the regulations in question," because it promulgated those regulations. *Id.*

The Board adjudicates with regard to a wide variety of matters. For instance, the Board interprets the aggravated felony definition at 8 U.S.C. § 1101(a)(43). See, *e.g.*, *In re Puente*, 22 I. & N. Dec. 1006 (BIA 1999), *rev'd*, *In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002). So do District Courts throughout the country, because it is relevant to sentencing of individuals convicted of Illegal Reentry under 8 U.S.C. § 1326, U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) (2010); those decisions may be directly appealed to the Courts of Appeals. See, *e.g.*, *United States* v. *Chapa-Garza*, 243 F.3d 921, 926 (5th Cir.

Decisional Disparities in Agency Adjudication, 60 Stan. L. Rev. 475, 484 (2007).

[11] The Court in *Martin* presumed "that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." *Martin*, 499 U.S. at 152.

2001). Illegal Reentry is one of the most common convictions in the federal criminal system, accounting for thousands of convictions annually. TRAC Immigration, Illegal Reentry Becomes Top Federal Charge (June 10, 2011), http://trac.syr.edu/immigration/reports/251/. The Board appears to have no structural advantage over the federal courts in interpreting the aggravated felony statute. Yet the aggravated felony definition is within the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), and some circuits have granted deference to Board interpretations of those provisions, see, *e.g.*, *Restrepo* v. *Att'y Gen. of U.S.*, 617 F.3d 787 (3d Cir. 2010), decisions which thereafter define the scope of federal criminal sentences. See *United States* v. *Ascencion-Carrera*, 413 F. App'x 549 (3d Cir. 2011) (applying Restrepo's holding on sentencing appeal).

The Board adjudicates asylum applications; so does USCIS's Asylum Office, a specialized group of adjudicators trained specifically in the handling of asylum cases and as to techniques for interviewing asylum claimants. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 311, 381 (2007) ("[E]very new asylum officer completes an intensive five-week basic training course with testing. Each week, every regional office conducts four hours of training on new legal issues, country conditions, procedures, and other relevant matters.... [A]sylum officers currently receive much more initial and ongoing training than the immigration judges.").

The Board makes decisions regarding admissibility under 8 U.S.C. § 1182, in the course of adjudicating Adjustment of Status applications. See, *e.g.*, *In re*

Lemus-Losa, 24 I. & N. Dec. 373 (BIA 2007). The precise number of Adjustment cases adjudicated by the Board is not publicly available, but in FY2010, the Immigration Courts (of whose decisions a limited number are appealed to the Board) granted 8,475 applications for Adjustment of Status. U.S. Dep't of Justice, FY10 Statistical Year Book, at R3 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. By contrast, USCIS approved over 550,000 applications for Adjustment of Status and adjudicated more than 35,000 applications for waivers of inadmissibility.[12] The Secretary of State adjudicated 6.5 million visas in fiscal year 2010.[13] These numbers dwarf the numbers of cases handled by the Board.

The Board's powers vis-à-vis regulations also highlights the Board's limited role. The Board of Immigration Appeals does not itself issue regulations, but rather, considers itself to be bound by regulations. *In re Moreno-Escobosa*, 25 I. & N. Dec. 114 (BIA 2009); *In re Ponce De Leon*, 21 I. & N. Dec. 154, 158 (BIA 1996) ("A regulation ... has the force

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[12] *See* Randall Monger and James Yankay, Annual Flow Report, March 2011: U.S. Legal Permanent Residents: 2010, at 2, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf; U.S. Dep't of Homeland Sec., Office of Citizenship and Immigration Services Ombudsman, Waivers of Inadmissibility: Additional Improvements Needed to Enhance the Current Filing Process and Minimize Reluctance to File at 8, Table D (June 10, 2010), *available at* http://www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf.

[13] *See* U.S. State Dep't, Report of the Visa Office 2010, Table I, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2006-2010, *available at* http://www.travel.state.gov/visa/statistics/statistics_5240.html.

and effect of law as to this Board and Immigration Judges."). Regulations may be promulgated by the Attorney General or by sister agencies. See, *e.g.*, 8 C.F.R. § 103.7(b)(1) (setting application fees for *inter alia*, applications for Adjustment of Status).

In short, Congress has given the Attorney General controlling authority over the interpretation of the immigration laws, 8 U.S.C. § 1103(a)(1), but the Board exercises that authority on the basis of subject matter expertise which is not unique or particularly extensive. The current structural nature of the Board would support a more limited form of deference than *Chevron* deference.

C. The BIA Lacks the Resources to Adequately Provide Legal Guidance on Issues Affecting Thousands.

Immigration law is often said to be "second only to the Internal Revenue Code in complexity." *Baltazar-Alcazar* v. *INS*, 386 F.3d 940, 948 (9th Cir. 2004). Yet the resources given the Board are incommensurate with its responsibility to interpret those provisions, particularly given their import to many millions of individuals.

For example, in 2007, the Board's eleven members completed 35,393 appeals, amounting to approximately 136 appellate decisions—over 12 per member—per workday.[14] In 2008, the number of appeals increased by over eight percent, to 38,369. *Id.* Even if the Board had the maximum number of members allowed at the time (fifteen), each member

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[14] *See* Darren H. Weiss, Comment, *X Misses the Spot: Fernandez v. Keisler and the (Mis)appropriation of Brand X by the Board of Immigration Appeals*, 17 Geo. Mason L. Rev. 889, 917–18 (2010) (citing BIA sources).

would have been responsible for authoring over ten appeal decisions *per day*. *Id.*; Cf. *Mead Corp.*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

It is not surprising, when Board members can devote only between seven and ten minutes to each case, that the Board has repeatedly issued flawed decisions. See, *e.g.*, *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (noting that in the year ending September 23, 2005, the Seventh Circuit "reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits."). As Judge Posner has stated, the BIA's failures "can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate." *Kadia* v. *Gonzales*, 501 F.3d 817, 821 (7th Cir.2007).

Examples of the BIA's failure to observe even "elementary principles of adjudication" litter the Federal Reporter. *Niam* v. *Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (listing erroneous BIA decisions from the Second, Seventh, Eighth, and Ninth Circuits); see, *e.g.*, *Sosnovskaia* v. *Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("the procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard"); *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005) (the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment,

personal speculation, bias, and conjecture"); *Wang* v. *Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding"). It has made fatal mistakes when addressing facts. *E.g. Soumahoro* v. *Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (the immigration judge's factual conclusion is "totally unsupported by the record"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (the immigration judge's "very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Chen* v. *U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (the immigration judge's finding is "grounded solely on speculation and conjecture"). These decisions are illustrative of a much larger number of examples suggesting problems within the BIA.

The stakes in these cases are often of the highest order. The instant cases, not atypically, involve permanent exile from family, friends, longstanding residence, and employment. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (removal "may result . . . in loss of both property and life, or of all that makes life worth living"). Asylum cases involve stakes no less significant, as erroneous denial could lead to torture, persecution, or death. *Uanreroro* v. *Gonzales*, 443 F.3d 1197, 1208 (10th Cir. 2006). Judicial review over individual immigration case determinations is often severely restricted, see, *e.g.*, 8 U.S.C. §§ 1252(a)(2)(B), (a)(2)(C), leaving the courts unable to remedy injustices flowing from statutory misinterpretations. In this context, the importance of a fair reading of the laws can hardly be understated.

D. In *Aguirre-Aguirre*, the Court Was Not Presented With Arguments Against *Chevron* Deference, and That Decision Pre-Dates *Mead*.

When the Court decided *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), the Court was not presented with any substantive arguments against application of the *Chevron* regime to the Board's decisions in immigration cases. Cf. Br. for the Resp't, No. 97-1754, 1999 WL 26721, at *29 (U.S. Jan. 21, 1999); Br. Amicus Curiae of the Lawyers Comm. for Human Rights in Support of the Resp't, No. 97-1754, 1999 WL 23657 (U.S. Jan. 21, 1999); Brief for Amicus Curiae in Support of the Resp't, No, 97-1754, 1999 WL 26718 (Jan. 21, 1999). The only arguments raised in that case were whether the lower court's analysis was consistent with Chevron. See Br. for the Resp't, 1999 WL 26721, at *29-30.

While the Court has described the application of Chevron as "well settled," *Negusie*, 555 U.S. at 516, *Aguirre-Aguirre* is of fairly recent vintage, and predates the Court's decision in *Mead Corp.*, 533 U.S. at 236. *Arobelidze* v. *Holder*, 653 F.3d 513, 520 (7th Cir. 2011). While several decisions of this Court have relied *Aguirre-Aguirre* and *Chevron*, the precise level of deference was rarely decisive. See, *e.g.*, *Judulang* v. *Holder*, No. 10-694, 2011 WL 6141311, at *7 n.7 (U.S. Dec. 12, 2011) (finding no effective difference between review under *Chevron* and under the Administrative Procedures Act). Reconsideration would be appropriate at some point; and this case may present an appropriate vehicle.

Adopting a lesser form of deference to the Board would not resolve the adjudicatory problems of the Board, but it would avoid the embarrassment to the system which would be entailed when the federal

courts may be overruled by an administrative law board, on the basis of hasty work, without public exposure, on the basis of limited expertise, and with gravely insufficient resources.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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